Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 642.

STEPHEN W. CAREY AND OTHERS,
APPELLANTS,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY AND OTHERS.

Appeal from the Circuit Court of Appeals for the Fifth Circuit.

Motion to Dismiss the Appeal.

Now the Houston and Texas Central Railway Company, The Houston and Texas Central Railroad Company, The Central Trust Company of the City of New York, The Farmers' Loan and Trust Company of the City of New York, Nelson S. Easton, James Rintoul, Benjamin A. Shepherd, Frederick P. Olcott, George E. Downs, The Southern Pacific Company, Charles Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, R. W. Cave, J. J. Atkinson, A. H. Swanson, Charles Fowler, Robert Brewster, Gus Mayhoff, and The Lone Star Land Company, named as appellees, by J. Hubley Ashton, E. B.

Kruttschnitt, and Adrian H. Joline, their counsel, who appear specially and solely for the purpose of making this motion to dismiss, move this Honorable Court to dismiss the appeal upon which the above-entitled case was docketed, June 5, 1895, and for grounds and in support of this motion, they aver and show as follows:

I. No appeal to this Court was or has been taken by Stephen W. Carey and others from the decree of the Circuit Court of Appeals for the Fifth Circuit, rendered on June 5, 1894, affirming the decree of the Circuit Court of the United States for the Eastern District of Texas, rendered on November 16, 1892, dismissing the bill of the said parties, for the reason that the Honorable A. P. McCormick, Circuit Judge, had no power to make the order, in the record, made and signed by him on May 2, 1895, allowing the said parties an appeal to this Court from the said decree of the said Circuit Court of Appeals, as prayed for in their petition filed on the said day, or to allow the said parties an appeal to this Court from the said decree of the said Circuit Court of Appeals, and had no power to sign the citation, in the record, signed by him on May 2, 1895, citing the said Houston and Texas Central Railway Company, and others, as appellees, to appear in this Court, as mentioned, pursuant to an alleged appeal filed in the Clerk's office of the said Circuit Court of Appeals, to show cause why the decree as in the said alleged appeal mentioned should not be corrected, and had no power to take and approve the bond, in the record, taken and approved by him, on May 2, 1895, as security in respect

to the said alleged appeal by the said Stephen W. Carey and others to this Court from the said decree of the said Circuit Court of Appeals.

The said order signed by the said Circuit Judge, the said citation, and the said bond, and each of them, being without legal authority, the record shows no appeal allowed to or obtained or taken by the said Stephen W. Carey and others, to this Court from the said decree of the said Circuit Court of Appeals.

II. The decree of the Circuit Court of Appeals for the Fifth Circuit, rendered June 5, 1894, affirming the decree of the Circuit Court of the United States for the Eastern District of Texas, rendered November 16, 1892, dismissing the bill in the suit of *Stephen W. Carey and others against The Houston and Texas Central Railway Company and others*, was final, and no appeal lies to this Court therefrom, under the provisions of section 6 of the Judiciary Act of March 3, 1891, c. 517, inasmuch as the jurisdiction of the said Circuit Court in and over the main suit or controversy therein, to which the said suit of *Stephen W. Carey and others against The Houston and Texas Central Railway Company and others* was ancillary and subordinate, and upon which the jurisdiction of the said Circuit Court in and over the said latter suit wholly depended, was entirely dependent upon the opposite parties thereto being citizens of different States.

III. The decree of the said Circuit Court of Appeals, on the appeal taken to that Court by Stephen W. Carey and others from the said decree of the said Circuit Court,

Division, and a line from Bremond to Ross, known as the Waco and Northwestern Division.

It, also, owned lands acquired from the State.

The property of the Company was subject to the lien of seven mortgages, known respectively as the Main Line First mortgage, Western Division First mortgage, Waco and Northwestern Division First mortgage, Main Line and Western Division Consolidated mortgage, Waco and Northwestern Division Consolidated mortgage, Income and Indemnity mortgage, and General mortgage.

On January 1, 1885, the Company made default in the payment of interest on its Main Line First Mortgage bonds and its Western Division First Mortgage bonds, and thereupon certain suits in equity were instituted against the Company relative to the mortgaged property in the Circuit Court of the United States for the Eastern District of Texas.

The jurisdiction of the Circuit Court over the parties and subjects-matter of those suits was asserted, rested and invoked, by the several bills, upon the ground of the diverse citizenship of the parties.

These suits bear certain *numbers* on the Equity Docket of the Circuit Court, by which they were known and identified in the original and main proceedings in that Court, and in the subsequent ancillary proceeding instituted by Carey and others in the Circuit Court.

The suits will be now stated, the reference being to their numbers as mentioned.

Suits Nos. 183 and 184.

On February 11, 1885, soon after the default mentioned, Nelson S. Easton and James Rintoul, citizens and residents of the State of New York, the trustees under the Main Line First Mortgage and the Western Division First Mortgage, filed their bills in equity in the Circuit Court against the Houston and Texas Central Railway Company, as a corporation and citizen of the State of Texas, for the purpose of enforcing the trust provided in the mortgages, protecting the trust property, obtaining the proceeds of sale of certain lands covered by the mortgages, and for other relief in respect to the sinking-fund provided for by the mortgages, and they prayed for an accounting, an injunction, a decree of sale of part of the trust property, and a receivership of all moneys, notes, mortgages or other evidences of debt received by the Railway Company upon sales of such lands.

These suits were known as Nos. 183, 184, Equity Docket (*Bills*, Record, pp. 619, 658.)

The Houston and Texas Central Railway Company appeared and answered these bills (Record, pp. 645, 684.)

Suit No. 185.

On February 16, 1885, the Southern Development Company, a corporation organized under the laws of the State of California, and a citizen and resident of that State, in its own behalf, and in behalf of all other persons similarly situated, who might intervene in the suit to protect their own interests, filed its bill of com-

plaint in the Circuit Court against the Railway Company, as a corporation organized under the laws of the State of Texas, and a resident of the Eastern District of Texas, alleging, among other things, that it was a creditor of the defendant for large sums advanced for supplies, labor, repairs, operating and managing expenses, proper equipments, and other necessary expenses, amounting to more that $600,000; that this indebtedness was contracted by the defendant in consideration of its promise to pay the same out of its earnings; that it was in equity a charge upon the income and property of the defendant; that there had been a diversion of the income to pay interest on the bonded debt; and that by reason thereof a lien had resulted in favor of the complainant, which it was entitled to have enforced in a Court of Equity.

The bill also alleged numerous other facts, including the absolute insolvency of the Railway Company, and the loss and injury which would be occasioned by a sale of the property in parts or fragments; and it prayed for the appointment of receivers to take possession of the railways and lands of the defendant, and the payment of the complainants' claim out of the rents, revenues, and earnings of the properties. (Bill, Record, p. 696.)

The Houston and Texas Central Railway Company appeared in this suit, No. 185.

On February 20, 1885, under the prayer of the bill, an order was made by the Circuit Court appointing Benjamin G. Clark and Charles Dillingham joint re-

ceivers of all the property, real and personal, of the company. (Order, Record, p. 731.)

The Court thereupon and thereby took all the property into its possession and under its control.

On April 20, 1885, the Southern Development Company filed an amendment to its bill in *No. 185*, consisting in making Nelson S. Easton and James Rintoul, trustees, citizens of the State of New York, the Farmers' Loan and Trust Company, trustee, a corporation and citizen of the State of New York, and Benjamin A. Shepherd, trustee, a citizen of the State of Texas, and a resident of the Eastern District of that State, defendants thereto; and praying in great detail that accounts might be taken of all sums due to the complainant and other creditors of the Railway Company; that all liens and encumbrances should be marshalled; that the net earnings should first be applied to the payment of the amount due to the complainant and intervening similarly situated parties; and that if the net amounts should not be sufficient for the payment of the claims, then that the *corpus* should be similarly applied, and a sale thereof made for such purposes. (Amended Bill, Record, p. 723.)

The Houston and Texas Central Railway Company answered the bill of the Southern Development Company on its merits. (Answer, Record, p. 734.)

The defendants, Easton and Rintoul, trustees, filed demurrers to the bill. (Demurrers, Record, pp. 745, 748.)

Suit No. 188.

On March 18, 1885, the Circuit Court of the United States for the Eastern District of Texas was thus in possession of all the properties of the Railway Company, under its order of February 20, 1885, in the case of the Southern Development Company, appointing Clark and Dillingham joint receivers of those properties, above mentioned.

On that day the Farmers' Loan and Trust Company, a corporation and citizen of the State of New York, brought its bill in equity in that Court against the Railway Company (No. 188, Equity Docket), alleging that it was the trustee under the Waco and Northwestern Division first and consolidated mortgages and the Main Line and Western Division consolidated mortgage of the Houston and Texas Central Railway Company; that the mortgagors had violated many of their agreements in relation to the trust property; and that default had been made in the payment of interest. It further averred the insolvency of the company, the pendency of the suits hereinbefore mentioned, and the jeopardy of the trust property, and it prayed for an accounting, an injunction, a decree of sale of part of the trust property, and for a Receiver of all the property of every description of the Houston and Texas Central Railway Company, with full power to operate the railway and carry on its business under the protection of the Court, and the usual powers of Receivers and managers of railroads. (*Bill*, Record, pp. 753–785.)

The defendant Railway Company appeared and answered this bill on the merits, June 22, 1885. (*Answer*, Record, pp. 786–799.)

On May 7, 1885, the Court made three orders in these cases, viz.:

(1) Order in No. 185, directing the Receivers to account to the trustees for proceeds of land sales, and with respect to the payment of expenses, etc. (Record, pp. 280–286.)

(2) Order in Nos. 183 and 184, making said last-mentioned order applicable to those causes (pp. 277–279).

(3) Order in No. 188, making the same order as to No. 188 (pp. 287–289).

Suits Nos. 198 and 199.

On January 21, 1886, Easton and Rintoul, trustees under the two first mortgages set up in causes Nos. 183 and 184, citizens of the State of New York, filed two other bills in equity for the *foreclosure and sale of the railway property, covered by said two mortgages.* In the bill to foreclose the Main Line first mortgage (No. 198, Equity Docket), the complainants made the Houston and Texas Central Railway Company, and one Benjamin A. Shepherd, a citizen and resident of Texas, and trustee under the Income and Indemnity mortgage, defendants; and as to the Farmers' Loan and Trust Company, they alleged, as follows (Record, pp. 272–273):

"And your orators further allege that the Farmers' Loan and Trust Company, as trustees under the said mortgages or deeds of trust hereinafter described, will,

as your orators believe, be benefited by, and it is to their advantage that the judgment and relief hereinafter prayed for or some part thereof, should be granted to your orators. That said property covered by the said first mortgage on said Main Line, as well as all the other property, assets, and effects of said Railway Company, being now in the hands of this Court, by the receivership existing in respect of the same, and your orators thereby being required by law to institute this action in this Court and to come before this tribunal, in order to reach the property in its possession, and to obtain its rights concerning the same, and all the parties interested in the property covered by said mortgage on the Main Line, as well as on all the other mortgages and property of said Railway Company, being now before the Court in said actions hereinbefore described as Nos. 183, 184, 185, and 188, on the Equity Docket of this Court, the said Farmers' Loan and Trust Company may and should be made a party defendant in this cause irrespective of its citizenship. And said corporation should be brought in as a defendant herein by the order and direction of this Court, and should be bound by the judgment and proceedings herein."

In the bill to foreclose the Western Division first mortgage (No. 199, Equity Docket) the same parties were joined as defendants, and a like averment was made as to the Farmers' Loan and Trust Company and the jurisdiction of the Court. (Record, pp. 507–508)

It will be observed that the Farmers' Loan and Trust Company *was not named as a defendant*, but the Court was asked to make it a defendant. As will be seen later, this request was never granted.

Process was issued under both of the last-mentioned bills, and duly served upon the defendants named therein, viz., the Railway Company and Shepherd, and no one else. (Record, pp. 290–293, 524–527).

No. 201.

On April 24, 1886, the Farmers' Loan and Trust Company, trustee, a corporation organized under the laws of the State of New York, and a citizen of that State, filed a bill in equity in the same court, for the *foreclosure of the general mortgage* (No. 201, Equity Docket; Record, p. 551). It made the Railway Company, a corporation and citizen of the State of Texas, sole party defendant, and prayed for a sale of all the property of the Railway Company to satisfy the mortgage debt. Process was issued and served. (Record, pp. 567, 568.)

The Railway Company filed its answers in Nos. 198 and 199 on May 15, 1886. (Record, pp. 294, 528.)

There were thus six several suits instituted in the Circuit Court by the various mortgage trustees, described and numbered, respectively, *183*, *184*, *188*, *189*, *199*, and *201*, and in them the parties named, in the bills, as complainants and defendants, respectively, were citizens of different States.

The jurisdiction was asserted and invoked on the ground of diverse citizenship.

There was, also, the suit of the Southern Development Company (No. 185), instituted February 16, 1885, the jurisdiction there resting and being invoked expressly upon the ground of diverse citizenship, in which the Circuit Court appointed receivers of all the property of the Railway Company.

Order, May 26, 1886, consolidating Nos. 198, 199, and 201, under the No. 198.

This being the state of the litigation, on May 26, 1886, an order was entered by Mr. Justice Woods and Judge Pardee, on motion of the defendant Railway Company, in the six (6) suits upon the mortgages, above described, whereby it was ordered, adjudged, and decreed by the Court that no further proceedings should be taken in causes Nos. *183*, *184*, and *188*, without notice to the Railway Company, and that causes Nos. *198*, *199*, and *201* should be consolidated under the *No. 198*, under the name and style of *Nelson S. Easton and James Rintoul, Trustees, and the Farmers' Loan and Trust Company, Trustee*, vs. *The Houston and Texas Central Railway Company, and Benjamin A. Shepherd*, Trustee, consolidated cause; that in said cause, Easton and Rintoul should stand as *complainants*, as trustees, under the mortgages made by the defendant Railway Company, bearing date, respectively, July 1, 1866, and December 21, 1870; that the *Farmers' Loan and Trust Company*, expressly assenting thereto, should stand as *complainant*, as trustee under the mortgages made by the Railway Company, bearing date, respectively, June 16, 1873, October 1, 1872, May 1, 1875, and April 1, 1881, and that Benjamin A. Shepherd should stand as *defendant*, as trustee under the mortgage made by the defendant Company, bearing date May 7, 1877; that the bills filed in causes Nos. *198*, *199*, and *201* should stand as bills in the *consolidated cause*, and might be amended by either complainant, as might be advised, and as provided in the order; and that in case

any one or more of the bills filed by the complainants, in the causes consolidated, should be finally dismissed, the remaining bill or bills should continue to stand as the bill in such consolidated cause. (*Order of Consolidation*, Record, p. 799.)

This order was made under the authority of the Act of March 3, 1875. (Pacific R. R. *v.* Ketchum, 101 U. S., 289.)

Order Appointing Receivers in Consolidated Cause.

On the same day, May 26, 1886, an order was made by the same Judges, in Consolidated Cause, *No. 198*, appointing Nelson S. Easton, James Rintoul, and Charles Dillingham receivers of all the property of the Railway Company, and directing Clark and Dillingham, as receivers in *No. 185* (*The Southern Development Company* vs. *The Houston and Texas Central Railway Company et al.*) to immediately transfer and deliver all said property to the receivers so appointed in Consolidated Cause *No. 198*. (Record, p. 802.)

Decree Dismissing No. 185.

On the following day, May 27, 1886, and after, by the order of May 26, 1886, the possession of all the property in controversy had passed into the hands of Easton, Rintoul, and Dillingham, as receivers in the Consolidated Cause *No. 198*, the Court made a decree dismissing the bill of the Southern Development Company in cause *No. 185* for *want of equity*, and not for want of jurisdiction, and declared and directed that "all said property being now in the custody of the Court, and

such custody and control being continuous, the entry of this decree shall operate *ipso facto* a transfer of the legal custody of said property from said Clark and Dillingham to the said receivers in *No. 198*." (Record, p. 750.)

Amendments to the bill to foreclose the general mortgage were filed in Consolidated Cause No. 198, on August 2, 1886, October 12, 1886, and April 8, 1887 (pp. 320, 387, 424).

The Houston and Texas Central Railway Company answered in Consolidated Cause 198, on September 3, 1886 (pp. 378, 385).

Cross-Bills of Shepherd and Farmers' Loan and Trust Company in No. 198.

On April 30, 1888, Shepherd, trustee, with leave of the Court, filed a cross-bill in No. 198, to foreclose the Income and Indemnity mortgage (p. 443).

The Railway Company answered, admitting the truth of the cross-bill, May 1, 1888 (p. 451).

On May 1, 1888, the Farmers' Loan and Trust Company filed bills (called cross-bills), with leave of the Court, to foreclose the Main Line and Western Division consolidated mortgage and the Waco and Northwestern Division consolidated mortgage (pp. 453, 469).

The Railway Company answered these bills May 2, 1888 (pp. 479, 481).

The Farmers' Loan and Trust Company answered Shepherd's cross-bill May 2, 1888 (p. 478).

All the mortgages were now under foreclosure except the Waco and Northwestern Division first mortgage,

and the Consolidated Cause No. 198 was in condition for hearing and decree.

Decree of Foreclosure and Sale, May 4, 1888.

On May 4, 1888, the Court made its decree of foreclosure and sale, in Consolidated Cause No. 198, which is set forth in the Record (pp. 575, 618).

The property was sold under the decree on September 8, 1888, at Galveston, Texas. The property covered by the Waco and Northwestern First mortgage was purchased subject to that mortgage by George E. Downs for $25,000, and all the residue of the property of the Railway Company was sold to Frederic P. Olcott, President of the Central Trust Company, for $10,580,000. (*Report of Sale*, pp. 809–814.)

The sale was duly confirmed on December 4, 1888. (*Order*, p. 815.)

II.—The subsequent proceedings in the ancillary suit by Stephen W. Carey and others in the Circuit Court to vacate the decree of foreclosure and sale.

The material contents of the bill and amended bill are stated in *Carey* v. *Houston and Texas Central Railway* (150 U. S., 170).

The bill was filed December 23, 1889, nearly five years after the Circuit Court had made its order in the suit of the Southern Development Company, *No. 185*, appointing receivers of all the property, real and personal, of the Houston and Central Texas Railway Com-

pany, and more than three years after the possession of that property had passed into the hands of the receivers in the Consolidated Cause, *No. 198*, and more than eighteen months after the entry of the decree of foreclosure and sale in that cause, sought to be impeached.

The complainants were Carey, a citizen of New Jersey, and six other persons, citizens of New York, and British subjects, respectively, who purported to sue as stockholders of the Houston and Texas Central Railway Company, in their own behalf, and in behalf of all others similarly situated.

The defendants were The Houston and Texas Central Railway Company (No. 1), The Houston and Texas Central Railway Company (No. 2), The Central Trust Company of New York, The Farmers' Loan and Trust Company, as trustee, and a number of other corporations, respectively, citizens of New York, Kentucky, Texas, and Louisiana.

The bill alleged that the complainants purchased shares in the capital stock of the Railway Company, at different times, prior to the transactions complained of, the whole aggregating five thousand shares.

It averred that the Company, between July, 1886, and April, 1881, executed the seven mortgages to different trustees hereinbefore described, which constituted the subject matter of the litigation in cause *No. 198*, and the bill gives the list of the various bonds issued by the Company prior to the issue of its general mortgage bonds, from which it will be seen that said bonds prior in issue to the general mortgage bonds aggregated in amount $16,823,000.

It averred that in and prior to 1883, the defendant Huntington, who with his associates controlled the Southern Development Company, formed a syndicate with his associates for the purpose of acquiring in his own interest and that of the Southern Development Company the control of the Houston and Texas Central Railway Company, and that having obtained such control all rights of the holders of the stock were sought to be effectually shut out and barred, and the absolute control of the company acquired by said syndicate, so that the railway might be run solely in the interest of said syndicate and the Southern Pacific Company (p. 71).

The bill further alleged that in January, 1885, when the holders of the first mortgage bonds presented their coupons for payment, it was fraudulently and wrongfully contrived by said Huntington and his associates that said coupons were cashed and secretly taken up by the Southern Development Company without notice to the holders thereof; that thereupon the said company commenced a suit against the Houston and Texas Central Railway Company, in the Circuit Court of the United States for the Eastern District of Texas, claiming that the latter company was indebted to it in the sum of $600,000 for money loaned and advanced at various times during the preceding six years to take up coupons, and for other purposes; and that in February, 1885, the appointment of Receivers was procured in said action, the order being made with the consent of said Railway Company through its solicitors (p. 72).

The bill then alleged that on January 21, 1886, the

defendants, Easton and Rintoul, trustees, filed two bills in the said Circuit Court for foreclosure, and subsequently, on April 20, 1886, the Farmers' Loan and Trust Company filed a bill in that court, which said bills were described as Nos. 198, 199 and 201, respectively; and that at May Term, 1886, all the parties consenting, the cases were consolidated as No. 198 (pp. 72, 73).

It averred that, at said May Term, the suit of the Southern Development Company was dismissed, and thereupon the defendants, Easton, Rintoul, and Dillingham, were appointed joint receivers of the Houston and Texas Central Railway Company in said consolidated cause, the company, through its counsel, consenting (p. 73).

The bill alleged that in none of the mortgages was it provided that the failure to pay interest upon any of the bonds should be taken to precipitate the maturity of the principal, nor did they provide for or permit the sale of the railway prior to the maturity of the principal of the bonds referred to in the respective mortgages, and that the answer of the Railway Company in said suits expressly placed in issue by denying that the principal sum of the said bonds had become due or demandable, and averring that the Court had no power to decree a sale of the railway prior to the maturity of the bonds or prior to the sale of the lands covered by the mortgages (pp. 73, 74).

It then alleged the making of the agreement for the reorganization of the Houston and Texas Central Railway Company, and that, in pursuance of the scheme

mapped out, the complainants in said consolidated cases applied for, and, on consent, procured to be entered, a decree therein, filed May 4, 1888, for the foreclosure of the said mortgages and a sale of the said property; and that the property was offered for sale under said decree and sold on September 8, 1888, to the defendant Frederic P. Olcott, the president of the Central Trust Company, for the sum of $10,580,000, excepting the Waco and Northwestern Division, which was sold to defendant Downs for defendant Huntington and his associates (pp. 75–81).

The bill charged that "the said decree was and is absolutely invalid and void, and beyond the power of the court to grant; that there was no foundation for said decree, or jurisdiction in the court to award it, and that the same was entered by consent and agreement and without an investigation or adjudication by the court, but was the result of agreement simply, and was procured (as complainants allege on information and belief) by collusion and fraud on the part of said Huntington and his associates, and the directors and officers of said Houston and Texas Central Railway Company, and was and is a part of the scheme to acquire possession of the said railway in the interest of said Huntington and the said Southern Pacific Company without regard to the rights or interests of the holders of the stock of the said company No. 1, and in direct disregard of the provisions and terms of the mortgages; that the defenses interposed that the principal of the mortgages had not become due, and that the said railway could not be sold without a sale first of the lands,

and the other defenses interposed were substantially abandoned and withdrawn as part of the said wrongful and fraudulent scheme herein referred to;" and "that the decree was the result of the agreement which the bondholders had made with the said Southern Pacific Company and the Central Trust Company, and the rights of the stockholders were not considered or protected by any of the parties to the record in said cause" (pp. 81, 82).

It was averred that the decree was non-judicial and void (p. 82).

The bill proceeded to allege that, on acquiring the possession of said railway under the foreclosure sale, defendant Huntington and his associates caused to be filed articles of incorporation under the laws of Texas, organizing a company known as the Houston and Texas Central Railroad Company (designated in the bill as No. 2) for the purpose of operating the railway, and, thereupon, on or about September 1, 1889, issued a notice to the stockholders of the Houston and Texas Central Railway Company (No. 1) that they could participate in the new company, provided they pay an assessment of seventy-three dollars upon each share of stock held by them; that said assessment was an attempt to compel the stockholders of company No. 1 to turn over their stock to said Huntington and his associates, and to purchase from them stock in the new company; and that complainants, on learning of said assessment, were thereby warned of the wrongful and fraudulent nature of the said transactions, which they at once took steps to investigate (pp. 83, 85).

The bill averred that the said new company is capitalized to the amount of $10,000,000, and it is intended to issue the mortgage bonds referred to in the plan of reorganization, and place the same upon the market; wherefore, immediate action by the equitable interposition of a Court of Equity is essential (p. 86).

It was alleged that the directors acted and were acting in the interest of said Huntington and his syndicate and the Southern Pacific Company, and have interests inimical to those of the complainants and other stockholders; that any notice to the Board of Directors, or any of them, to institute suit to vacate said decree and sale, or appeal therefrom, would be a futile formality; that complainants have made an earnest effort to obtain redress at the hands of the directors and shareholders; and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no jurisdiction (pp. 86, 87).

The prayer of the bill was that the decree rendered by the Court on May 4, 1888, in said consolidated cause in the suit of Nelson S. Easton and James Rintoul, trustees, and the Farmers' Loan and Trust Company, as trustee, against the Houston and Texas Central Railway Company and others, be vacated and set aside and adjudged to be fraudulent, collusive, illegal, and void, and that complainants be permitted to intervene and become parties defendant in said suit, and to be heard and defend the same; that the sale of the railroad and lands of the Houston and Texas Central Railway Company (No. 1,) under said decree, be vacated and set aside, and the said railway lands restored to the posses-

sion of the Receivers appointed by this Court; that the defendants be enjoined temporarily and perpetually from executing, delivering, or recording any mortgage upon the property of the company referred to in said decree, and from issuing, alienating, or parting with any shares of stock of the new or reorganized Houston and Texas Central Railroad Company (No. 2), or any bonds secured by mortgage upon any property claimed to be possessed by said company, or any stock or bonds issued or intended so to be pursuant to said reorganization agreement, and for further relief (pp. 88, 89).

General demurrers to this bill for want of equity were interposed, in the first instance, by several of the defendants.

The demurrers were afterwards withdrawn, and the defendants answered the bill.

The answers denied the allegations upon which the complainants sought to impeach the validity and integrity of the decree of the Court below in the foreclosure proceedings against the Houston and Texas Central Railway Company, and the other transactions referred to in the bill, and averred the regularity, validity, integrity, and good faith of all the proceedings and transactions assailed by the bill (pp. 54, 105, 114, 128, 142, 160, 174).

Replications to the several answers were filed by the complainants.

Decree of the Circuit Court and Appeals.

On November 16, 1892, the Circuit Court entered a final decree dismissing the bill as to all the defendants, with costs (*Decree*, p. 848; *Opinion*, p. 840; reported in 52 Fed. Reporter, 671).

On December 3, 1892, the complainants prayed two several, separate, and duplicate appeals from this final decree: one to the Circuit Court of Appeals for the Fifth Judicial Circuit, and the other to the Supreme Court of the United States (pp. 849, 850). The appeals were allowed, and citations were issued (pp. 879, 880). The complainants filed in the Circuit Court an assignment of errors on their appeal to the Circuit Court of Appeals containing a specification of fifty-five alleged errors in the decree of the Court below, and an assignment of errors on their appeal to the Supreme Court of the United States, containing a specification of forty-four alleged errors in that decree.

Upon motion of the appellees, the appeal to this Court was dismissed on November 13, 1893, upon the ground that under the Judiciary Act of 1891 the case was not appealable to the Supreme Court. (*Carey* v. *Houston and Texas Central Railway Co.*, 150 U. S., 170.)

The Decree of the Circuit Court of Appeals.

The case on the appeal taken to the Circuit Court of Appeals was heard by that Court, composed of Judge McCormick, Circuit Judge, and Judges Locke and Parlance, District Judges, in April, 1894, being in November Term, 1893, and, on June 5, 1894, at the same

term, that Court rendered a decree affirming the decree of the Circuit Court, dismissing the bill, as follows:

"November Term, 1893.

"S. W. Carey *et al.*, Appellants,
vs.
"Houston and Texas Central Railway Company *et al.*, Appellees."

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Texas, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court, in this cause, be and the same is hereby affirmed.

"It is further adjudged and decreed that the appellants, S. W. Carey, Warren S. Sillcocks, I. Van Schaick, D. P. Ingraham, James Lansdale, Geo. Wilson, and Andrew S. McClelland, and the sureties in the appeal bond herein, R. B. Hawley and Julius Runge, be condemned, *in solido*, to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court." (Record, p. 911.)

III.—Application to Judge McCormick for an Allowance of an Appeal to this Court.

On May 2, 1895, eleven months after the entry of this decree by the Circuit Court of Appeals, and after the expiration of the November Term, 1893, of that Court, at which the decree was entered, a petition, entitled in the cause in the Court of Appeals, and signed by the Solicitor of the appellants, in that Court, Stephen W. Carey and others, was presented to Judge McCormick, the Circuit Judge, praying an allowance of an appeal

from the decree to this Court, as follows (Record, pp. 918, 919):

"United States Circuit Court of Appeals, Fifth Circuit.

"Stephen W. Carey *et al.*, Appellants,
vs.
"The Houston and Texas Central Railway Co, *et al.*, Appellees.

"The above named appellants, conceiving themselves aggrieved by the decree rendered and entered herein, on the fifth day of June, 1894, in the above-entitled cause, do hereby appeal from said decree to the Supreme Court of the United States, and they *pray that their appeal may be allowed*, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) RUSSELL H. LANDALE,
Attorney for Appellants,
10 Wall St., New York City."

On the same day, May 2, 1895, Judge McCormick signed an order in writing upon this petition, as follows (Record, p. 919):

"And now, to wit, on the 2d day of May, 1895, it is ordered that the appeal be allowed as prayed for.

(Signed) A. P. MCCORMICK."

The paper is described, in the transcript, "*Petition for appeal and order allowing same*," and is endorsed, "*Filed May 2, 1895. J. M. McKee, Clerk.*" (Record, pp. 918, 919.)

On the same day, May 2, 1895, Judge McCormick, as Circuit Judge, signed a citation directed to the Houston and Texas Central Railway Company, and other parties,

named, citing them "to be and appear before the Supreme Court of the United States, within 30 days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein S. W. Carey and others are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against said appellants as in said appeal mentioned, should not be corrected," &c. (Record, p. 921.)

And, on the same day, Judge McCormick, as Circuit Judge, approved a bond for $500 presented by Carey and others, conditioned for the successful prosecution of their alleged appeal, which is endorsed as "filed May 2, 1895," in the office of the Clerk of the Circuit Court of Appeals. (Record, pp. 919, 920.)

On the same day, May 2, 1895, an assignment of errors, entitled in the cause in the Circuit Court of Appeals, was filed by Carey and others in the office of the Clerk of that Court, alleging errors in the decree of the Court affirming the decree of the Circuit Court. (Record, pp. 913–918.)

The case upon the supposed appeal was docketed, in this Court, on the 4th of June, 1895.

A motion is now made by the parties, named as appellees, to dismiss the case upon the several grounds therein specified.

Argument in Support of the Motion.

THE FIRST GROUND.

No appeal to this Court has been taken or obtained by Stephen W. Carey and others from the decree of the Circuit Court of Appeals, rendered on June 5, 1894, at the November Term, 1893, as the Circuit Judge had no authority by law, on May 2, 1895, to make the order, signed by him, on that day, allowing the parties an appeal to this Court from that decree, as prayed for by them, on that day, or to sign the citation signed by him, or to take the bond taken by him, on that day, as upon an appeal duly allowed to this Court.

I.

The learned Circuit Judge, as a member of the Circuit Court of Appeals, which actually heard the appeal in the Carey case, or as a Judge "competent to sit" as a member of that Court, had no power, on May 2, 1895, to allow an appeal from that decree, under the Act of March 3, 1891.

By section 3 of the Judiciary Act of March 3, 1891, c. 517, the Chief Justice and the Associate Justices of this Court, assigned to each Circuit, and the Circuit Judges within each Circuit, and the several District Judges within each Circuit, are "competent to sit" as Judges of the Circuit Court of Appeals within their respective Circuits as provided. In case the full Court at any time shall not be made up by the attendance of the Chief Justice, or an Associate Justice of this Court and

Circuit Judges, one or more District Judges within the Circuit are "competent to sit" in the Court according to such order or provision among the District Judges as either by general or particular assignment shall be designated by the Court.

A Judge is a member of a Circuit Court of Appeals, only when and as he is a member of a sitting Court.

By section 4, "the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court or in the Circuit Courts of Appeals hereby established according to the provisions of this Act regulating the same."

Section 5 specifies six classes of cases in which "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court."

By section 6, the Circuit Courts of Appeals exercise appellate jurisdiction "to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section."

By that section the judgments or decrees of the Circuit Courts of Appeals are "final" in the five classes of cases therein specified, excepting as provided in respect to certificates and the writ of *certiorari*, and "in all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars. But no such appeal shall be taken or writ of error sued out unless within one year

after the entry of the order, judgment, or decree sought to be reviewed."

By section 11, "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this Act in respect of the Circuit Court of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any Judge of the Circuit Courts of Appeals, *in respect of cases brought or to be brought to that Court* shall have the same powers and duties as to the *allowance of appeals or writs of error*, and the conditions of such allowance, as now by law belong to the Justices or Judges in respect of the existing Courts of the United States."

By rule 36 of this Court, promulgated May 11, 1891, "an appeal or writ of error from a Circuit Court or a District Court direct to this Court," in the cases provided for in sections 5 and 6 of the act of 1891, "may be allowed in term time or in vacation by any Justice of this Court, or by any Circuit Judge within his Circuit, or by any District Judge within his District, and the proper security be taken, and the citation signed by him, and he may, also, grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal."

Such being the pertinent provisions of the Act of 1891, and the rule of this Court, it is clear that no power was thereby conferred on the Circuit Judge of the Fifth Circuit, as a Judge or member of the Circuit Court of Appeals for that Circuit, to allow an appeal

from the decree of that Court, in this case, sought to be brought within the appellate jurisdiction of this Court, or to sign a citation for the appearance of a party to the decree in this Court, and take security upon the allowance of an appeal to this Court, and, especially, that he had no authority to perform such acts, out of court, after the expiration of the term of the Circuit Court of Appeals at which the decree was rendered.

The provisions of section 11 of the Act of 1891, above referred to, manifestly define the powers and duties intended to be conferred and imposed on the Judges of the Circuit Courts of Appeals in respect to the allowance of appeals or writs of error, and the conditions of such allowance, in cases, civil or criminal, sought to be brought to those Courts from the District Courts or the existing Circuit Courts, and do not empower or authorize a Judge of a Circuit Court of Appeals to allow appeals or writs of error in cases determined by that Court, for the purpose of bringing the decrees or judgments therein within the appellate jurisdiction of this Court, as not "final" under the provisions of section 6, of the Act of 1891.

The provision is express that "any Judge of the Circuit Courts of Appeals, in respect of cases *brought or to be brought to that Court* shall have the same powers and duties as to the *allowance of appeals or writs of error*, and the conditions of such allowance, as now by law belong to the Justices or Judges in respect of the *existing Courts* of the United States respectively,"

and it can not be extended or enlarged as a grant of powers and as imposing duties upon the Judges of the Circuit Courts of Appeals in respect to the allowance of appeals or writs of error, and the conditions of such allowance, in cases sought to be brought to the Supreme Court of the United States from the Circuit Courts of Appeals under the limitation of the 6th section of the Act.

II.

The learned judge had no authority, as the Circuit Judge of the Fifth Circuit, to allow an appeal to this Court, from the decree of the Circuit Court of Appeals.

By sections 999, 1000, and 1012, of the Revised Statutes, a Judge of a Circuit Court is authorized to sign a citation and take security upon a writ of error from or an appeal to the Supreme Court for the review of a judgment or decree of the Circuit Court.

An appeal can and may be allowed by a Judge who has power to sign a citation and take security, and, therefore, a Judge of a Circuit Court may allow an appeal to this Court from a final decree of the Circuit Court. (Sage *v.* Railroad Co., 96 U. S., 712.)

But the statutory provisions referred to do not authorize a Circuit Judge, as a Judge of the Circuit Courts in his Circuit, to allow an appeal, and sign a citation and take security upon an appeal, to the Supreme Court from a decree of the Circuit Court of Appeals for his Circuit.

It is well settled that the District Judge, as a member of the Circuit Court for his District, may allow an appeal to this Court from a decree of the Circuit Court, and sign a citation and approve a bond on such an appeal. (Sheppard *v.* Wilson, 5 How., 212; Rodd *v.* Heartt, 17 Wall., 357.)

Chief-Justice Chase, in his opinion in *Rodd* v. *Heartt*, the last opinion ever delivered by him, said: "though upon appeals from the District Court, the District Judge has no vote, he has in all respects the powers of a member of that Court, *and may consequently allow appeals from its decisions.*"

If a Circuit Judge for a Circuit has power to allow appeals to this Court from the decisions of the Circuit Court of Appeals for the Circuit, the same power must be possessed by every judge of a District Court within the Circuit.

III.

The rule and practice as to writs of error for the review of judgments of the Circuit Court of Appeals appear to conclude the question.

It is understood by counsel that the Clerks of the Circuit Courts of Appeals have been instructed or advised by the Clerk of this Court, with the approval or sanction of the Court, that writs of error to judgments of the Circuit Courts of Appeals can not be issued from the offices

of the Clerks of those Courts, but must be issued from the Clerk's Office of the Supreme Court.

A writ of error for the review of a judgment of a Circuit Court of Appeals is and can be issued by the Clerk of this Court, it is understood, only upon such writ being allowed by one of the Justices of this Court, who signs the citation, and takes the requisite security, in the case.

It would seem that under the rule and practice thus established, as we understand, an appeal to this Court from a decree of a Circuit Court of Appeals must be allowed by one of the Justices of this Court, and that the citation should be signed and the security approved by him.

The same limitations apply to appeals from the decrees of the Circuit Courts of Appeals as to writs of error to the judgments of those Courts, under the Act of March 3, 1891.

A decree of the Circuit Court of Appeals is to be deemed final unless it appears affirmatively that the case was *not* one subject to the final adjudication of that Court, and it is proper, therefore, that an application for an allowance of an appeal from a decree of the Circuit Court of Appeals should be made to one of the Justices of this Court.

But however that may be, it seems clear that if a Circuit Judge can not allow a writ of error to a judgment of the Circuit Court of Appeals for his Circuit, and can not sign a citation and take the requisite security on such a writ of error, a Circuit Judge is incompetent to allow

an appeal to this Court from a decree of the Circuit Court of Appeals within his Circuit, and to sign a citation and approve a bond on such an appeal.

IV.

The Circuit Judge having no authority by law to allow an appeal to this Court from the present decree of the Circuit Court of Appeals, no appeal has been taken or obtained by the parties from that decree, upon which this Court can take jurisdiction of the case, and the appeal, so-called, upon which the case has been docketed, in this Court, should be dismissed.

It is a familiar rule that an appeal to this Court is not taken or obtained, by a party, unless such an appeal has been allowed to him by a Court or Judge having authority by law to allow an appeal, in the case, to this Court, and that where the record on file does not show such an allowance of an appeal to this Court, the case, as docketed here, will be dismissed. (Barrel *v.* Transportation Company, 3 Wall., 424; R. R. Co. *v.* Bradleys, 7 Wall., 575; Edmonson *v.* Bloomshire, 7 Wall., 311; Pierce *v.* Cox, 9 Wall., 787.)

The rule and practice are founded on the principle, so often declared by this Court, that nothing can be treated as merely technical, and for that reason to be disregarded, which is prescribed by Congress as the mode of exercising the Court's appellate jurisdiction. (U. S. *v.* Curry, 6 How., 113; Edmonson *v.* Bloomshire, 7 Wall., 310.)

THE SECOND GROUND.

The decree of the Circuit Court of Appeals, on June 5, 1894, affirming the decree of the Circuit Court, on November 16, 1892, dismissing the bill in the Carey suit, was final, and no appeal lies to this Court therefrom, under Section 6 of the Judiciary Act of March 3, 1891, inasmuch as the jurisdiction of the Circuit Court in and over the main suit or controversy therein, to which the Carey suit was ancillary and subordinate, and upon which the jurisdiction of the Circuit Court in and over the Carey suit wholly depended, was entirely dependent upon the opposite parties thereto being citizens of different States.

I.

The supposed appellants, having already had the benefit of a review by the Circuit Court of Appeals of the decree of the Circuit Court, dismissing their bill, can not be entitled to a review of that decree, by this Court, unless it clearly appears from the record that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States.

1. The learned Court, speaking by the Chief Justice in the former *Carey* appeal, observed that the Judiciary Act of 1891 "in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the Circuit Court of Appeals, designated the classes of cases in respect to which each of these Courts

was to have *final jurisdiction* (the judgments of the latter being subject to the supervisory power of this Court through the writ of *certiorari*), and the Act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in this Court." (150 U. S., 179.)

By section 6 of that Act the decisions of the Circuit Courts of Appeals are made final "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." And it is also provided that "in all cases, not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars." (25 Stats., 826, 828.)

In the recent case of *Rouse* v. *Letcher* (156 U. S., 47, 50), which, like this, was an appeal from a decree of the Circuit Court of Appeals, in an ancillary suit in the Circuit Court, this Court, speaking, also, by the Chief Justice, said: "If the decree of the Circuit Court of Appeals was final under the sixth section, then this appeal must be dismissed, *and in order to maintain that the decision was not final it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States.*"

The appeal given by the Act from decrees of the Circuit Court of Appeals in cases in which the jurisdiction of the Circuit Court was *not* dependent entirely upon the opposite parties being citizens of different States, is

thus an *exception* to the general rule of the Act, which makes the decisions of the Circuit Court of Appeals final in all cases embraced by the subjects of its appellate jurisdiction.

Of course, the *exception* is to be strictly construed, and no case can be deemed within the exception unless it is clearly within its terms.

2. No appeal to this Court can be maintained under the exception, therefore, unless it clearly appears that "the jurisdiction of the Circuit Court was *not* dependent entirely upon the opposite parties being citizens of different States." Such is the doctrine of *Rouse* v. *Letcher.*

II.

It was a settled principle of Federal jurisprudence, long before the Judiciary Act of 1891, that the jurisdiction of the Circuit Court over suits between citizens of different States, comprehended and included suits and proceedings ancillary, auxiliary, or supplemental to independent suits in that Court, and that such dependent suits can be maintained therein without regard to the citizenship of the immediate parties, because they are supported by the jurisdiction existing over the original suits, which is a continuing one for that purpose.

1. The character of and jurisdiction over such suits as related to the main, or original and independent, proceedings in the Circuit Court, were luminously treated by Mr. Justice Miller in *Minnesota Company* v. *St. Paul Company* (2 Wall., 609–633), and the principles

there enunciated were the basis of the judgments of the Court in the subsequent well-known cases of *Jones* v. *Andrews* (10 Wall., 333); *Krippendorf* v. *Hyde* (110 U. S., 276, 285); *Pacific Railroad of Missouri* v. *Missouri Pacific Railway Company* (111 U. S., 505, 522); *Gumbel* v. *Pitkin* (124 U. S., 131, 143, 145); *Foster* v. *Mansfield, Coldwater, and Lake Michigan Railroad Company* (146 U. S., 88; affirming 36 Fed. Rep., 627); *Stewart v. Dunham* (115 U. S., 61, 64); *Richmond* v. *Irons* (121 U. S., 27, 52); *Dewey* v. *West Fairmount Gas Coal Co.* (123 U. S., 333); *Rouse* v. *Letcher* (156 U. S., 47, 49).

The Court, speaking by Mr. Justice Miller, in *Minnesota Co.* v. *St. Paul Co.*, said:

"The question is not whether the proceeding is supplemental and ancillary, or is independent and original, in the sense of the rules of equity pleadings, but whether it is supplemental and ancillary, or is to be considered entirely new and original, *in the sense which this Court has sanctioned with reference to the line which divides the jurisdiction of the Federal Courts from that of the State Courts.* No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this Court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that Court, it is not to be considered as an original bill, but as a continuation of the proceedings at law; so much so that the Court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another State, if he be a party to the judgment."

The decisions referred to by Mr. Justice Miller in this passage, no doubt, were *Logan* v. *Patrick* (5 Cranch,

288); *Simms* v. *Guthrie* (9 *Id.*, 25); *Clark* v. *Mathewson* (12 Pet., 164); *Dunlap* v. *Stetson* (4 Mason, 349.) See, also, *Wiswall* v. *Sampson* (14 How., 52); *Freeman* v. *Howe* (24 *Id.*, 450); *Buck* v. *Colbath* (3 Wall., 334.)

2. Manifestly, the provisions of the Act of 1891 respecting the final jurisdiction of the Circuit Court of Appeals in cases in which the jurisdiction of the Circuit Court depends entirely upon diverse citizenship, must be construed and applied with direct reference to and in the light of these adjudications, and the doctrines affirmed by them.

III.

The learned Court has, in fact, so construed and applied the provisions of the Act of 1891 referred to, in the recent and leading cases of Colorado Mining Company *v.* Turck (150 U. S., 138), *and* Rouse *v.* Letcher (156 U. S., 47), *in which it is conclusively adjudged that the Act authorizes no appeal to this Court from the decree of the Circuit Court of Appeals in an ancillary or supplemental suit or proceeding in the Circuit Court, where the jurisdiction of the latter Court in the main or original suit or controversy depended entirely upon the opposite parties being citizens of different States.*

1. The decision in *Rouse* v. *Letcher* proceeded upon the view that the decree of the Circuit Court, in an ancillary or supplemental suit, was "the exercise of power invoked at the institution of the main suit, and *it is to that point of time that the inquiry as to jurisdic-*

tion must necessarily be referred," and consequently that where the jurisdiction of that Court in the main or original suit depended wholly upon diverse citizenship, the decree of the Circuit Court of Appeals in the ancillary or supplemental suit or proceeding, could not be be the subject of review by this Court agreeably to the intention of the Act of 1891. "Decrees upon controversies separable from the main suit may, indeed, be separately reviewed, but the jurisdiction of the Circuit Court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit."

In *Rouse* v. *Letcher*, the main foreclosure suit was between citizens of different States on the face of the bill, and the Court appointed receivers of the railroad property in that suit.

A proceeding, by intervention, was afterwards instituted, in the Circuit Court, against the receivers, who appealed to this Court from the decree of the Circuit Court of Appeals against them. This Court dismissed the appeal, because the opposite parties to the foreclosure suit were citizens of different States.

The contention of the receivers, who sought to appeal to this Court from the decree of the Circuit Court of Appeals, was, that the suit, by intervention, in the Circuit Court, was one arising under the Constitution and laws of the United States, because the cause of action was asserted against them as officers of the Court, and arose, as alleged, by reason of negligence on their part in the course of their receivership; but this Court held that the intervening proceeding was to

be regarded as ancillary or supplemental to the foreclosure suit, and that the jurisdiction of the Circuit Court over that proceeding was to be treated, therefore, as entirely dependent upon the jurisdiction of the Court over the foreclosure suit, which was founded upon the diverse citizenship alleged in the bill.

The Chief Justice, delivering the opinion of the Court, said:

"And since where jurisdiction would not obtain in an independent suit, an intervening proceeding may nevertheless be maintained as *ancillary and supplemental* under jurisdiction already subsisting, such proceeding is to be regarded in that aspect, even *in cases where the Circuit Court might have jurisdiction of an independent action.*

"Here, as we have said, the jurisdiction of the Circuit Court was invoked, in the first instance, by the filing of the bill, and it was under that jurisdiction that appellee intervened in the case, and that jurisdiction depended entirely upon diverse citizenship. * * * If the word 'controversy' added anything to the comprehensiveness of the section, the fact remains that the exercise of the power of disposition over this intervention, whether styled suit or controversy, was the exercise of power invoked at the institution of the main suit, and it is to that point of time that the inquiry as to jurisdiction must necessarily be referred. (Colorado Central Mining Co. *v.* Turck, 150 U. S., 138.) Nor can the conclusion be otherwise, because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed be separately reviewed, but the jurisdiction of the Circuit Court over such controversies is not therefore to be ascribed to grounds independent of jurisdiction in the main suit. We are unable to attribute to Congress the intention of allowing final orders on every incidental controversy involving over one thousand dollars to be brought to this Court for review, while denying such review of the principal decree, although involving millions."

2. The framers of the Act of 1891 were entirely familiar with the doctrines of this Court in regard to the jurisdiction of the Circuit Court over ancillary or supplemental suits growing out of or having direct reference to original and independent suits, and the decrees therein, and the foundation of the Federal jurisdiction over such auxiliary proceedings in the Circuit Court, as declared in the cases above cited, and it is to be conclusively presumed that they intended that those doctrines should govern the construction and effect to be given to the Act of 1891, in respect to the final appellate jurisdiction of the Circuit Court of Appeals "in *all* cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being citizens of different states."

Those doctrines are to be deemed incorporated in the Judiciary Act of 1891.

IV.

The bill in the Carey suit was ancillary or supplementary to the foreclosure suit, in the Circuit Court, and, agreeably to the foregoing argument, no appeal lies to this Court from the decree of the Circuit Court of Appeals, which affirmed the decree of the Circuit Court dismissing the bill, if, as has already appeared, the jurisdiction of the Circuit Court over the foreclosure suit, in which the decree complained of was rendered, was entirely dependent upon the opposite parties being citizens of different States.

1. It will be observed, upon the face of the Carey bill, that the Circuit Court had no jurisdiction or color of

jurisdiction to entertain that bill, as an original and independent bill for relief in that Court.

The complainants and defendants therein were not citizens of different States. On the contrary, several of the complainants were alleged to be citizens of New York, and numerous defendants, in the bill, were averred to be citizens of the same State. (See Bill, Record, pp. 63, 64.)

The jurisdiction of the Circuit Court over that suit did not purport to be founded upon the diverse citizenship of the parties.

Independently of the foreclosure suit, the decree in which was sought to be impeached by the Carey bill, the latter suit was, of course, not sustainable, for a moment, in the Circuit Court.

The bill was *brought* merely as an ancillary bill.

2. It is settled, by the authorities, cited above, that a bill in equity, by a corporation, or the stockholders of a corporation, in the Circuit Court, to set aside a final decree of that Court against the corporation in a foreclosure suit, upon the ground that such decree was obtained by collusion and fraud, and the Court had no jurisdiction to make it, is an *ancillary suit*, and a continuation of the main suit, on the question of the jurisdiction of the Circuit Court, under the principles adjudged in *Minnesota Company* v. *St. Paul Company* (2 Wall., 609, 633), and *Krippendorf* v. *Hyde* (110 U. S., 276), which have been already mentioned.

The character of such a bill in respect to the jurisdiction of the Circuit Court was directly presented to this

Court, and determined, in the leading and well-known case of *Pacific R. R. of Mo.* v. *Missouri Pacific Ry.* (111 U. S., 505, 522), where Mr. Justice Blatchford, speaking for the Court, said:

"The bill falls within recognized cases which have been adjudged by this Court and have been recently reviewed and reaffirmed in *Krippendorf* v. *Hyde*. On the question of jurisdiction, the suit may be regarded as *ancillary to the Ketchum suit*, so that relief may be granted by the Court which made the decree in that suit, without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice Miller in *Pacific Railroad* v. *Missouri Pacific Railway Co.* (1 McCrary, 647). *The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the Circuit Court. Minnesota Co.* v. *St. Paul Co.*, 2 Wall., 609, 633."

The bill in that case, as well known, was brought in the Circuit Court for the Eastern District of Missouri by the corporation mortgagor, a citizen of Missouri, against another corporation (a citizen of Missouri) and other citizens of Missouri, alleging fraud and collusion in the original foreclosure suit, and praying that the decree of foreclosure and sale be set aside.

The Court held, as we have seen, that the Circuit Court had jurisdiction of the bill only as ancillary to the foreclosure suit.

The same principle necessarily applies to any bill which the stockholders of a corporation may have a right to maintain, in the Circuit Court, for the purpose of impeaching as collusive and fraudulent, and without

jurisdiction, a decree of foreclosure and sale rendered against the corporation in that Court.

This was adjudged in the case of *Foster v. Mansfield, Coldwater and Lake Michigan Railroad Company*, in the Circuit Court for the Northern District of Ohio, where Mr. Justice Jackson, then Circuit Judge, said:

"There is no want of jurisdiction growing out of the fact that some of the defendants are citizens of the same State (Ohio) with the complainants, inasmuch as this suit may properly be regarded as *ancillary or supplemental to the original suit in which the decree complained of was made.* It is well settled that in such cases suit may be maintained without regard to the citizenship of the parties. (Minn. Co. *v.* St. Paul Co., 2 Wall., 609; Krippendorf *v.* Hyde, 110 U. S., 276; Railroad Co. *v.* Railroad Co., 111 U. S., 505.) It is also well settled that a *shareholder* may interpose and set the machinery of the law in motion for the protection of corporate rights, or the redress of corporate wrongs, when the corporate management, after proper demand, refuse or fail to act in the matter. The question is, has the corporation, under the showing made by the bill, any right to complain of the decree made by the Court, and has that right been lost by the laches of itself, or the complainants, in the assertion of their rights." (36 Fed. Rep., 627.)

The decree, dismissing the bill, in that case, was affirmed by this Court (146 U. S., 88).

It is entirely clear, therefore, that a stockholders' bill in the Circuit Court attempting to impeach for alleged collusion and fraud a decree rendered by that Court against the corporation, in a foreclosure suit, is to be deemed and treated as ancillary, auxiliary, or supplementary to the original foreclosure proceeding in the Circuit Court.

3. The bill, in the Carey suit, under the principles of Federal jurisdiction thus settled by this Court, could only be maintained, in the Circuit Court, as *ancillary* to the foreclosure suit, in that Court, and "a continuation of that suit, on the question of the jurisdiction of the Circuit Court," in the language of Mr. Justice Blatchford in the Missouri Pacific Case. It was in legal character like the bill, in that case, to impeach the Ketchum decree, and almost identical with the stockholders' bill in the case of *Foster* v. *Mansfield, Coldwater and Lake Michigan R. R. Co.*, before Mr. Justice Jackson, and subsequently before this Court.

The gravamen of the bill, briefly stated, was that by alleged collusion and fraud a final decree of foreclosure and sale was rendered by the Circuit Court, on May 4, 1888, in Consolidated Cause, *No. 198*, against the Houston and Texas Central Railway Company, which it was beyond the power of the Court to render for want of jurisdiction, and which was a part of an alleged scheme to fraudulently acquire possession of the property in the interest of an alleged syndicate; and the bill accordingly prayed, that the decree rendered by the Court, on May 4, 1888, in that cause, in the suit of Nelson S. Easton and James Rintoul, trustees, and the Farmers' Loan and Trust Company, as trustee, against the Houston and Texas Central Railway Company and others, be vacated and set aside, and adjudged and decreed to be fraudulent, collusive, illegal, and void; that complainants be permitted to intervene, and become parties defendant in that suit; that the sale, under the decree, be vacated

and set aside, and the property restored to the receivers; and that the defendants be enjoined, etc. (Record, pp. 81, 89.)

It is thus manifest that the Circuit Court in which the foreclosure proceedings were had, and by which the final decree sought to be impeached and avoided, was rendered, could alone afford the relief prayed by the Carey bill for the alleged grievances of the complainants, and that any jurisdiction possessed by that Court to grant such relief was derived from and supported by the jurisdiction existing over the foreclosure suit, and that the bill, in its legal character and relation, was ancillary or supplementary to the foreclosure suit, in the Circuit Court, agreeably to the settled doctrines of this Court.

4. It only remains, therefore, to show—what, indeed, has already appeared—that the jurisdiction of the Circuit Court over the foreclosure suit, in which the decree complained of was rendered, was dependent entirely upon diverse citizenship.

V.

The jurisdiction of the Circuit Court in and over the foreclosure suit, in which the final decree of May 4, 1888, was rendered, was entirely dependent upon the opposite parties being citizens of different States. The parties, complainants and defendants, respectively, to the Consolidated Cause, No. 198, in which that decree was rendered, were citizens of different States, and the opposite parties to the three several suits, Nos. 198, 199, and 201, respectively, consolidated

under suit No. 198, were, likewise, citizens of different States. The jurisdiction of the Circuit Court in and over those suits, respectively, was asserted and rested in the bills on the ground of the diverse citizenship of the parties.

1. It has been seen that, on May 26, 1886, Mr. Justice Woods and Judge Pardee made an order in the six foreclosure suits that *No. 198* (the bill of Easton and Rintoul, trustees, to foreclose the Maine Line First Mortgage), *No. 199* (the bill of the same trustees to foreclose the Western Division First Mortgage), and *No. 201* (the bill of the Farmers' Loan and Trust Company to foreclose the General Mortgage), be consolidated under *No. 198*, in which *Easton and Rintoul*, who were citizens and residents of New York, and the *Farmers' Loan and Trust Company*, a corporation and citizen of New York, should stand as *complainants*, and the *Houston and Texas Central Railway Company*, a corporation and citizen of Texas, and *Benjamin A. Shepherd*, trustee, also, a citizen and resident of Texas, should stand as *defendants;* that the bills in suits *Nos. 198, 199* and *201* should *stand as bills in the consolidated cause;* and that in case any one or more of the bills filed by the complainants in the suits consolidated should be finally dismissed, the remaining bill or bills should continue to stand as the bill in such consolidated cause. (Order, May 26, 1886, Record, p. 799.)

On May 4, 1888, the final decree of foreclosure and sale complained of was rendered in the cause.

The order of May 26, 1886, was within the competent authority of the Circuit Court, under section 1 of the Act

of March 3, 1875 (18 Stat., part 3, 470), as construed by this Court. (Pacific R. R. *v.* Ketchum, 101 U. S., 298; Removal Cases, 100 U. S., 457; Evers *v.* Watson, 156 U. S. 532.) Chief-Justice Waite, in the *Ketchum Case*, said: "For the purposes of *jurisdiction*, the Court had power to ascertain the real matter in dispute, *and arrange the parties on one side or the other of that dispute.* If in such arrangement it appeared that those on one side *were all citizens of different States from those on the other, jurisdiction might be entertained, and the cause proceeded with.*"

The order of consolidation is determinate that the controversies about which the foreclosure suits were brought, were between citizens of different States.

2. The opposite parties to the Consolidated Cause, as constituted for the purpose of enabling the Court to proceed in one cause to a final decree upon the various mortgages in suit, were thus upon the face of the record citizens of different States, and the jurisdiction of the Court over the cause, and to render the decree of foreclosure and sale made therein on May 4, 1888, under the several bills in the suits consolidated, was thus asserted, and was complete, upon the ground of diverse citizenship.

The order is conclusive as to the ground of jurisdiction invoked in the foreclosure suits.

3. When we come to examine the bills in the foreclosure suits, constituting the elements of the Consolidated Cause, it is found that the jurisdiction of the Circuit Court over those suits (*Nos. 198, 199, and 201*) was

asserted and rested, in the bills, respectively, on the ground of the diverse citizenship of the parties, and that the Court had plenary jurisdiction of each of those suits, the parties and subject-matter, upon that ground.

(*a*) *No. 198* was the bill of *Easton and Rintoul, trustees, citizens of New York* v. *The Texas Central Railway Company, and Benjamin A. Shepherd, trustee, both citizens of Texas*, filed January 21, 1886.

This bill was to foreclose the Main Line First Mortgage.

The suit was thus one of which cognizance could properly be taken by the Circuit Court on the ground of diverse citizenship, and the jurisdiction was asserted and rested on that ground. (Bill, Record, pp. 249–276.)

The bill asked that the Farmers' Loan and Trust Company, of New York, be made a defendant to the suit by the order of the Court; but no such order was ever passed, and the order of consolidation made that Company a *complainant* in the Consolidated Cause.

The *subpœnas* were directed to the parties named as defendants in the bill alone. (Rec., pp. 290–293.)

(*b*) *No. 199* was the bill of *Easton and Rintoul, trustees, citizens of New York*, v. *The Houston and Texas Central Railway Company, and Benjamin A. Shepherd, trustee, both citizens of Texas*, filed January 21, 1886.

This bill was to foreclose the Western Division First Mortgage.

The Circuit Court had cognizance of this suit, and the jurisdiction was asserted and rested, in the bill, on

the ground of diverse citizenship. (Bill, Record, pp. 484–511.)

Although the bill asked that the Farmers' Loan and Trust Company might be brought in, by the order of the Court, as a defendant to the suit, no such order was ever made, and the Court directed that the Company should stand as a *complainant* in the Consolidated Cause.

Process was directed to and served upon the parties named as defendants in the bill alone. (Rec., pp. 524–528.)

(*c*) *No. 201* was the bill of *The Farmers' Loan and Trust Company, trustee, a citizen of New York*, v. *The Houston and Texas Central Railway Co., a citizen of Texas*, filed April 24, 1886. No other party was named as a defendant to the bill, which was to foreclose the General Mortgage. (Bill, Record, pp. 551–566.)

The Circuit Court had plenary jurisdiction of this suit, and jurisdiction was asserted and rested in the bill, on the ground of diverse citizenship.

If suits *Nos. 198 and 199* had been dismissed for want of jurisdiction, suit *No. 201* would have remained as one in which the jurisdiction of the Circuit Court was perfect on the ground of diverse citizenship.

4. There can be no question, therefore, upon the face of each one of the bills, in the three foreclosure suits, constituting the elements of the *Consolidated Cause, No 198*, that the jurisdiction of the Circuit Court over the parties and subject-matter of the suit, was perfect

and complete upon the ground of the diverse citizenship of the complainants and defendants, and was asserted and rested upon that ground.

The bill, in each case, showed affirmatively that the Circuit Court had jurisdiction of the suit by reason of diverse citizenship.

5. The citizenship of the parties to the three foreclosure suits, consolidated under suit *No 198*, as alleged in the bills, was not *controverted* by the defendants, who filed answers on the merits in the consolidated cause.

No question as to the jurisdiction of the Court on the ground of diverse citizenship, in any of the suits, as shown by the bills, can therefore be mooted.

6. After the order of May 26, 1886, cross bills were filed in the consolidated cause, with leave of the Court, by Benjamin A. Shepherd, trustee of the Income and Indemnity Mortgage, to foreclose that mortgage, and by the Farmers' Loan and Trust Company, trustee of of the Main Line and Western Division Consolidated Mortgage, and the Waco and Northwestern Division Consolidated Mortgage to foreclosure the latter mortgages.

These bills were put at issue by answers on the merits.

7. It is clear, therefore, that the jurisdiction of the Circuit Court in and over the Consolidated Cause, and the separate suits embraced therein, depended entirely upon the diverse citizenship of the parties to those suits, respectively.

VI.

But if any doubt existed under the bills in the foreclosure suits as to whether the Circuit Court could properly take cognizance of them on the ground of the diverse citizenship of the parties thereto, it is clear upon the record that the Court had jurisdiction of those suits, and its jurisdiction was dependent entirely upon the opposite parties being citizens of different States, in the meaning of the Act of 1891. At the time the foreclosure bills were filed, and at the time they were consolidated, the mortgaged property of the defendant Railway Company was in the possession of the Circuit Court by its receivers appointed in the original suit of the Southern Development Company, No. 185, and the property continued in such possession by the receivers appointed in the Consolidated Cause, No. 198. The jurisdiction of the Circuit Court over the foreclosure suits, separately, and as consolidated, was, therefore, supported by the jurisdiction of that Court, in and over the suit of the Southern Development Company, and that jurisdiction depended wholly upon the diverse citizenship of the parties to the suit. The jurisdiction of the Court over the foreclosure suits, embraced by the Consolidated Cause, was thus dependent entirely upon the opposite parties being citizens of different States, in the meaning of the Act of 1891, under the doctrines declared by this Court.

1. The property of the Houston and Texas Central Railway Company was taken into the possession of the Circuit Court, in the suit of *The Southern Development Company, a corporation and citizen of California* v. *The Houston and Texas Central Railway Company, a cor-*

poration and citizen of Texas, No. 185, and remained in the possession of that Court from the time when it so took possession of it until it was delivered to the purchaser under the decree complained of in the Carey suit.

The bill of the Southern Development Company was filed February 16, 1885, and its amended bill was filed April 20, 1885.

The parties to the bills unquestionably were citizens of different States, and the jurisdiction of the Circuit Court over the case was rested and could be asserted on no other ground. It depended entirely and absolutely upon diverse citizenship. (See the Bills, Record, pp. 696, 723.)

On February 20, 1885, under the prayer of the original bill, Clark and Dillingham were appointed joint receivers of all the property of the defendant Railway Company.

While the property was in their possession the foreclosure suits, Nos. 198, 199, and 201 were instituted in the Circuit Court. The bills were filed, respectively, January 21, 1886, and April 24, 1886.

On May 26, 1886, the foreclosure suits were ordered to be consolidated under *No. 198*.

On the same day, May 26, Easton, Rintoul, and Dillingham were appointed joint receivers of the property in the Consolidated Cause, and the receivers, Clark and Dillingham, appointed in *suit 185* (the Southern Development Company's suit), were ordered immediately to transfer and deliver to the receivers, so appointed,

all the property of the defendant Company theretofore held by them. (Record, p. 802.)

On May 27, 1886, a decree was entered sustaining the demurrers of Easton and Rintoul, trustees, to the bill of the Southern Development Company in suit No. 185, and the bill was dismissed by the Court for want of equity. (Record, p. 750.)

It was further ordered that the original receivers, Clark and Dillingham, should pass their accounts before the Special Master, and should turn over all the property of the Company in their possession to Dillingham, Easton, and Rintoul, who had theretofore been appointed receivers of the property in Consolidated Cause No. 198. (Record, p. 750.)

2. It thus appears, by the record, that at the time the bills in the forclosure suits, *Nos. 198, 199,* and *201,* were filed, the mortgaged property was in the possession of the Circuit Court under the Southern Development receivership; that the property remained in the possession of the Court under that receivership, up to May 26, 1886, when it was transferred to the receivers appointed in the foreclosure suits, *Nos 198, 199, and 201,* or, in other words, in Consolidated Cause No. 198; and that the bill of the Southern Development Company was dismissed for want of equity *on the day succeeding that upon which the new receivership, in the Consolidated Cause, went into effect.*

The jurisdiction of the Court over the claims of the trustees antedated, however, the new receivership by one year.

3. The jurisdiction of the Circuit Court, in the litigation, was thus invoked, in the first instance, by the filing of the bill of the Southern Development Company, upon which it appeared that the suit was one of which cognizance could properly be taken by that Court on the ground of diverse citizenship, and it did not appear therefrom that jurisdiction was rested or could be asserted, or invoked, upon any other ground.

Under that jurisdiction the Court took possession of the property, and *drew to itself the right to decide upon conflicting claims to its ultimate possession and control, to marshal all liens upon it, and to enforce them.* (Morgan Co. *v.* Texas Central Railway Co., 137 U. S., 171–201; Rouse *v.* Letcher, 156 U. S., 47–49.)

In this situation of the property of the Houston and Texas Central Railway Company, under the litigation, the mortgage trustees were unquestionably obliged to proceed against the Company in the Circuit Court for the Eastern District of Texas, under the jurisdiction invoked, in the first instance, by the filing of the original bill of the Southern Development Company, which depended, as we have seen, entirely upon diverse citizenship.

The mortgage trustees accordingly filed their bills to foreclose the mortgages in the Circuit Court for the Eastern District of Texas, asserting and resting jurisdiction, as we have seen, on the ground of the diverse citizenship of the parties to those suits.

In the situation, as it existed, the foreclosure suits may, perhaps, be regarded, jurisdictionally, as subordinate to, if not dependent on, the suit of the Southern Development Company. Certainly the jurisdiction of the Circuit Court over those suits was legally supported by the jurisdiction existing over and invoked in the suit of the Southern Development Company.

Under the principles already adjudged by this Court, the jurisdiction of the Circuit Court over the foreclosure bills, is legally ascribable to the same ground as that upon which the jurisdiction of the Court over the suit of the Southern Development Company was asserted and rested, in the bill, namely, *the diverse citizenship of the opposite parties to that suit.*

4. It is clear, therefore, under the adjudicated doctrines of this Court, that the jurisdiction of the Circuit Court over the foreclosure suits, is to be deemed entirely dependent upon the fact of diverse citizenship, apart from the character of those suits, under the averments of the bills, as distinctly between citizens of different States.

If it were true, therefore, that it did not appear upon the foreclosure bills, embraced by Consolidated Cause No. 198, that the Circuit Court could properly take cognizance of those suits by reason of the diverse citizenship of the immediate parties to them, the fact would be immaterial in the present inquiry, as the jurisdiction of the Circuit Court over the foreclosure bills was fully supported by the jurisdiction in the original suit of the Southern Development Com-

upon the opposite parties to the suit or controversy being citizens of different States."

As a principal decree of the Circuit Court of Appeals, in the foreclosure suit, could not have been brought, by appeal, to this Court for review, no appeal lies from the decree dismissing the bill, in this Carey suit, agreeably to the intention of the Act of 1891.

It is quite impossible to attribute to Congress the intention of allowing decrees of the Circuit Court of Appeals in ancillary or supplementary suits or proceedings to be brought to this Court for review, while denying such review of the principal decrees of the Circuit Court of Appeals in the main and original suits in the Circuit Court.

3. But, as we had the honor to say, at the beginning, the doctrine of this Court, twice declared, is that in order to maintain that the present decree of the Circuit Court of Appeals was *not* final, it must appear affirmatively that the jurisdiction of the Circuit Court was *not* dependent entirely upon the opposite parties being citizens of different States.

The intent and policy of the Act of 1891 were to relieve this Court by subjecting all cases in which the Federal jurisdiction depended upon diverse citizenship to the final adjudication of the Circuit Court of Appeals.

It was only by the Joint Resolution of March 3, 1891, that the jurisdiction of this Court was preserved as to pending cases of that class, and cases wherein the writ of error or appeal should be sued out or taken

before July 1, 1891. (Gulf, &c., R. R. Co. *v.* Shane, 157 U. S., 349.)

It is for an appellant, therefore, to show that in the particular case the jurisdiction of the Circuit Court was *not* dependent entirely upon the diverse citizenship of the opposite parties to the suit.

VIII.

The refusal of the Court to entertain the appeal taken directly to it by Carey and others from the decree of the Circuit Court, dismissing the bill, under the supposed authority of section 5 of the Act of 1891, has no bearing upon the question of the jurisdiction of the Court to entertain an appeal from the present decree of the Circuit Court of Appeals, affirming the decree of the Circuit Court, in the Carey suit, under the 6th section of the Act.

1. The 5th section of the Act of 1891 specifies six classes of cases in which appeals may be taken from the Circuit Court directly to this Court, and one class are cases "in which the jurisdiction of the Court is in issue," and in respect to them it is provided that "the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

Carey and others took two appeals from the decree of the Circuit Court dismissing their bill on the merits, one to this Court and one to the Circuit Court of Appeals.

On motion of the appellees, the direct appeal to this Court was dismissed. (Carey *v.* Houston & Texas Central Railway Co., 150 U. S., 170.)

No question as to the jurisdiction of the Circuit Court, in the Carey suit, was certified to this Court, nor did it appear that the jurisdiction of that Court was in issue.

As this Court observed, "appellants by filing their bill invoked the jurisdiction of the Court below over the entire case, the defendants did not contest that jurisdiction, and the Court adjudicated accordingly."

Carey and others conceded this, but contended that the question of jurisdiction was in issue because their bill attacked the jurisdiction of the Circuit Court over the *foreclosure suit*, or its jurisdiction to make the decree of foreclosure and sale passed in that suit.

This Court decided that "the fifth section does not authorize a direct appeal to this Court in a suit upon a question involving the jurisdiction of the Circuit Court over *another* suit previously determined in the same Court."

And the Court, speaking by the Chief Justice, said: "It is the jurisdiction of the Court below over the *particular case* in which the appeal from the decree therein is prosecuted, that, *being in issue and decided against the party raising it* and duly certified, justifies such appeal direct to this Court."

"*So far as this inquiry is concerned*," the Court said that the Carey suit, in the Circuit Court, to impeach the decree of that Court in the foreclosure suit, was a separate and distinct case from the foreclosure suit, as unquestionably it was.

The Court therefore ruled that no question of jurisdiction over the foreclosure suit or the rendition of the decree passed therein, could be availed of to sustain the

appeal to this Court from the decree of the Circuit Court, dismissing the Carey suit, taken under the supposed authority of section 5 of the Act of 1891.

2. This ruling manifestly has no bearing upon the inquiry arising upon the present motion as to whether the decree of the Circuit Court of Appeals, affirming the decree of the Circuit Court, in the Carey suit, upon the merits, is "made final" by the 6th section of the Act of 1891, as construed and applied by this Court in ancillary and supplemental suits and proceedings in the Circuit Courts. The ruling has no tendency to show that an appeal from that decree to this Court is given by the 6th section of the Act of 1891.

It was decided on the former appeal, that a direct appeal to this Court on the ground that the jurisdiction of the Circuit Court was "in issue," could be maintained only upon an issue, in the particular suit in which such an appeal is prosecuted, as to the jurisdiction of the Court below over *that* suit, and not another suit previously determined by the Court, and that the Carey suit to impeach the decree of the Circuit Court in the foreclosure suit, was so far a separate and distinct suit from the latter suit as that a direct appeal to this Court from the decree of the Circuit Court, dismissing the Carey suit, could not be maintained upon a question involving the jurisdiction of that Court over the previously determined foreclosure suit, agreeably to the construction and effect given by the Court, as stated, to the 5th section of the Act of 1891.

This ruling involved no determination or consider-

ation of the question arising upon the present motion, as to the character of the bill, in the Carey suit, *as related to the foreclosure suit, under the principles sanctioned by this Court in respect to the Federal jurisdiction over controversies between citizens of different States.*

The argument upon that question here submitted is, that the bill, in the Carey suit, while an original bill, in the chancery sense of the word, is, in the language of this Court, speaking by Mr. Justice Blatchford, in the Missouri Pacific case, "a continuation of the former suit *on the question of the jurisdiction of the Circuit Court.*" Such is its character under the settled principles of our Federal jurisprudence. In that character the bill was *brought* in the Circuit Court.

The proposition proceeds upon the view that the Carey bill, notwithstanding its character as an original suit in the sense of the rules of chancery proceedings, is entirely ancillary and subordinate to the foreclosure suit, "*in the sense which this Court has sanctioned with reference to the line dividing the jurisdiction of the Federal Courts from that of the State Courts,*" and that as the jurisdiction over the foreclosure suit depended entirely upon diverse citizenship, the present decree of the Circuit Court of Appeals in the ancillary and subordinate Carey suit, is "made final" by the 6th section of the Act of 1891, under the settled doctrines of this Court.

3. It thus appears that the inquiry upon the present motion "is not whether the proceeding is supplemental and ancillary, or is independent and original, in the sense of the rules of equity pleadings, but whether it

is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this Court has sanctioned with reference to the line which divides the jurisdiction of the Federal Courts from that of the State Courts." (Minnesota Co. *v.* St. Paul Co., 2 Wall., 609.) The present inquiry, therefore, relates to the character of the Carey suit, in the view of the jurisprudence of the Federal Courts, which, as we have said, treats the suit, although an original suit, in the chancery sense of the word, to impeach the decree in the foreclosure suit for alleged fraud, as entirely ancillary and subordinate to the foreclosure suit, and as such supported by the Federal jurisdiction over the foreclosure suit, and governed by the provisions of the 6th Section of the Act of 1891, making the decisions of the Circuit Court of Appeals "final" in all cases in which the jurisdiction of the Circuit Court is dependent entirely upon diverse citizenship.

This Court, speaking by the Chief Justice, in *Rouse* v. *Letcher*, said: "Decrees upon controversies separable from the main suit may, indeed, be separately reviewed, but the jurisdiction of the Circuit Court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit." Agreeably to the principle thus stated so clearly by the Chief Justice, although the Carey suit involved controversies separable from the foreclosure suit, the jurisdiction of the Circuit Court over the suit is not, on that account, to be ascribed to grounds *independent of jurisdiction in the foreclosure suit.*

The decree of the Circuit Court upon the controversies in the Carey suit, was, in fact, the subject of separate review by the Circuit Court of Appeals, under the Act of 1891, but, for the reason that the original jurisdiction of the Circuit Court over those controversies, can not, as we have shown, be ascribed to grounds *independent of jurisdiction in the foreclosure suit*, no appeal to this Court from the decree of the Circuit Court of Appeals, in affirmance of the decree of the Circuit Court, is given by that Act, as construed and applied by this Court.

4. The presumption is that the questions upon the merits of the suit were correctly decided by the Circuit Court of Appeals, as the final appellate tribunal provided for the case by the Judiciary Act of 1891.

It is respectfully submitted that the present motion should be granted by the Court.

J. HUBLEY ASHTON,
E. B. KRUTTSCHNITT,
ADRIAN H. JOLINE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 642.

STEPHEN W. CAREY AND OTHERS,
APPELLANTS,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY AND OTHERS,
APPELLEES.

Brief and argument in opposition to motion of the Houston and Texas Central Railway Company et al. to dismiss the appeal.

This appeal is taken from a decree of the United States Circuit Court of Appeals for the Fifth Circuit affirming the final decree of the United States Circuit Court for the Eastern District of Texas, dismissing the bill in equity exhibited by the appellants Carey and others against the Houston and Texas Central Railway Company and others.

This suit was brought to set aside a decree of the said Circuit Court rendered in the suit of Easton and Rintoul, Trustees, vs. Houston and Texas Central Ry. Co. *et al.*, known as Consolidated Cause No. 198 on the equity docket of said Court, as being without jurisdiction and in defiance of law. It is charged in this suit that

said decree was procured by fraud and collusion of the directors of the railway company with other parties and in violation of the law of procedure governing the action of said Court (p. 81), and that it was filed by permission of the Court without investigation, without testimony heard and in the absence of all judicial deliberation (p. 82). It is further alleged to be simply the result of an agreement between certain bondholders of the Houston and Texas Central Railway Company made without consulting the stockholders, and filed in said Consolidated Cause No. 198 by the collusion of the said directors (p. 82), and that it was a part of a conspiracy to appropriate to the Southern Pacific Company the property and lands of the Houston and Texas Central Railway Company, in which appellants, as stockholders, had a large interest. The said property consisted of several lines of railway, and the equipment thereof, and about four million five hundred thousand acres of land, worth, as is alleged, at least four dollars per acre.

At the time of the institution of this suit the said conspiracy had so far progressed that an order for the sale of said property had been procured by said parties. The pretense employed by them was that the creditors of said company would reorganize it, take up its old bonds and issue to themselves new securities in lieu thereof. To accomplish this they proceeded ostensibly under a so-called reorganization agreement (forming part of the record and filed in said Consolidated Cause No. 198 as is evidenced by the docket entries of said Cause (p. 572) but not included in appellees' extracts from the record), by which it was provided that judgment should be taken against the railway company for its outstanding obligations, and that the property should be sold, bought in and turned over to a new railroad company to be organized by them under the laws of Texas.

The mortgage debts of which foreclosure was had were *not due at the time the so-called decree ordered their payment* and no accounting was had by the Court to ascertain the indebtedness actually due by said company. The said decree *made without a hearing or deliberation* ordered that the defendant railway company pay *not only its indebtedness, matured and unmatured, but also about three millions in excess thereof, within thirty days, and that in default thereof the equity of redemption of said company should be forever cut off*, and under it, colorable sale was made of said property in lump to one of the parties to said conspiracy.

The history of the litigation resulting in the foreclosure decree is as follows:

Cause 183.

In February, 1885, the said Easton and Rintoul, citizens of New York, as trustees of the Main Line first mortgage, filed a bill against the Houston and Texas Central Railway Company in the United States Circuit Court for the Eastern District of Texas, *charging the directors of the railway company with having misappropriated funds realized from the sale of lands covered by the said Main-Line first mortgage*, and praying for an accounting, which suit was designated on the docket as Cause No. 183 (p. 619).

Cause 184.

At the same time the said Easton and Rintoul, as trustees of the Western Division first mortgage, filed another bill in said Court against the said company, *charging misappropriation by the directors and officers of said railway company of moneys realized from the sale of lands covered by said Western Division first mortgage*, and asking for an accounting, which suit was known as Cause No. 184 (p. 658).

Neither bill contained a prayer for a receiver nor any allegation giving the Court jurisdiction to appoint one, and no receiver was ever appointed in said suits or either of them.

Cause 185.

After said bills were filed, an action was commenced in said court by the Southern Development Company, a citizen of California, against the said Houston and Texas Central Railway Company, to recover certain moneys claimed to have been loaned and advanced, which was designated as Cause No. 185 (p. 696), and on the 20th of February, 1885, Charles Dillingham and Benjamin G. Clark were appointed in said last mentioned Cause receivers of the Houston and Texas Central Railway Company and all its properties (p. 731). On April 20, 1885, the Southern Development Company filed an amended bill, in which it was prayed that said Easton and Rintoul, the Farmers' Loan and Trust Company, citizens of New York, and Benjamin A. Shepherd, a citizen of Texas, be made defendants, and an order to that effect was entered (p. 723). Thereupon Easton and Rintoul filed a demurrer to the said complaint, alleging, amongst other things, that it disclosed no equity (p. 745). An amended demurrer was filed on January 23, 1886 (p. 748).

On May 27, 1886, said demurrers were *sustained* and a decree entered dismissing the complaint in Cause No. 185 (p. 750), from which no appeal was ever taken.

Cause 188.

In March, 1885, the Farmers' Loan and Trust Company, as trustee named in the Consolidated and General mortgages, commenced a suit, designated as Cause No. 188, against the said railway company, in which substantially similar charges were made as in Causes Nos. 183 and 184, to the effect *that the directors and officers of the railway company had wrongfully sold certain of the lands covered by the said mortgages, and had misappropriated the moneys realized from such sales,* and seeking, in addition to the relief prayed for in Causes 183 and 184, that receivers of the railway and its properties be appointed (p. 753). While no receivers were appointed, the order theretofore entered in Cause No. 185 was made applicable to said Cause 188 (p. 28). This was prior to the dismissal of Cause 185.

Causes 198 and 199.

On January 21, 1886, the said Easton and Rintoul, citizens of New York, as trustees under the Main Line first mortgage and the Western Division first mortgage, filed two bills in equity for their foreclosure (pp. 247, 482), in which the Houston and Texas Central Railway Company and Benjamin A. Shepherd, both citizens of Texas, and The Farmers' Loan and Trust Company, *a citizen of New York* (pp. 272, 507), were made defendants.

In both said bills *the action of the Southern Development Company No. 185, the only cause in which receivers had been appointed, was denounced as collusive and without equity,* as follows: "That this Honorable Court, not adjudging or determining that the "claims of said Southern Development Company was well founded, "or that its said bill is properly brought, or is well founded in equity, "but in duced by the representation and pretensions of said Southern "Development Company to the effect that the said property was in "danger and in great need of the protection of the Court, took the "same into its possession by the appointment of Receivers thereof, "by its order made in said action on the 16th day of February, "1885" (pp. 260–495).

The Houston and Texas Central Railway Co. filed answers to Causes 198 and 199 on May 15, 1886 (pp. 294, 528), and the Farmers' Loan and Trust Company filed its answers on August 2, 1886

(pp. 354, 366), which answers raised special issues, and a controversy between complainants and The Farmers' Loan and Trust Company, defendant, *both citizens of New York.*

Cause 201.

On April 20, 1886, the Farmers' Loan and Trust Company, trustee under the General mortgage, filed a bill to foreclose, which suit was designated upon the docket as Cause No. 201 (p. 567).

Consolidation Order.

On the 26th of May, 1886, all parties consenting, Causes Nos. 198, 199 and 201 were consolidated, and designated upon the docket as Consolidated Cause No. 198, and in the same order it was directed that Causes Nos. 183, 184 and 188 should be practically discontinued (p. 799). Nothing further was ever done in any of said last-mentioned cases.

On the same day Dillingham and the said Easton and Rintoul were appointed, in said Consolidated Cause No. 198, receivers of the Houston and Texas Central Railway, and all its properties (p. 802), and, Clark and Dillingham, the receivers appointed in Cause 185 were directed to turn over all the property to the said new receivers (p. 803).

This then was the situation on May 27, 1886. Cause No. 185 was dismissed, and its receivers directed to turn over the property to the receivers in Consolidated Cause 198, composed of Causes 198, 199 and 201 (p. 750).

None of the bonds issued by the railway company had matured, and in none of the mortgages is it provided that failure to pay interest should precipitate the maturity of the principal; nor do they provide for, or permit, the sale of the railway prior to the maturity of the principal of the bonds.

To the bills in Causes Nos. 198 and 199 the Houston and Texas Central Railway Company filed answers (pp. 294, 528), *placing in issue its liability for the principal of the bonds, on the ground that the same was not due or demandable, that the Court had no authority to set aside the terms and provisions of the deeds of trust, and to adjudge the principal to to be due when it would not be due for many years thereafter, that the Court had no power to decree that the railways should be sold prior to the maturity of the bonds, and then not*

until after the lands had first been first disposed of, and that the lands, if carefully administered and converted into money at a reasonable price, would materially reduce the indebtedness of the company, and enable it to pay the whole of its floating debt and the principal of the bonds.

In the answers of the Farmers' Loan and Trust Company in causes 198 and 199 (pp. 354, 366), it is alleged amongst other things, that:

"*No further or other right could in any case be held to exist on* "*the part of said complainants herein than to collect the interest in* "*arrears and overdue, and to collect the same, not by the sale of the* "*portion of the railway mortgaged, nor of the property appurtenant* "*thereto, but by the sale of the lands covered by the said deed of trust* "*or mortgage, or such portions thereof as it would be necessary to sell* "*in order to realize the amount due for overdue interest as aforesaid,* "*the said lands, and not the said railway, being the primary fund* "*for the payment thereof*" (pp. 361, 373).

After these answers were filed in August, 1886, nothing was done to bring the issues *or controversy between citizens of the same state*, to a hearing until December, 1887, when a number of the bondholders of the railway company, the Southern Pacific Company, a corporation controlled by the same persons who controlled the railway company (p. 234), and the Central Trust Company of New York, entered into a so-called reorganization agreement by which it was arranged that all the mortgages upon the property of the railway company should be foreclosed, and a new company organized to acquire its property and franchises.

This reorganization agreement which appellees have omitted to print was filed in Consolidated Cause No. 198 on May 3, 1888, as appears from the docket entries of said cause (p. 572).

Shepherd's Cross-Bill.

Four days before the entry of the decree in Consolidated Cause No. 198, and pursuant to said reorganization agreement, (not printed in the extracts from the record), a bill, improperly termed a cross-bill, was filed in said Consolidated Cause, by Benjamin A. Shepherd, a *citizen of Texas, trustee*, under the Income and Indemnity mortgage, against the Houston and Texas Central Railway Company, *a citizen of Texas*, and the Farmers' Loan and Trust Company, a citizen of New York,

to foreclose said Income and Indemnity mortgage (p. 443), *although all the bonds secured by said mortgage had been taken up and exchanged for bonds secured by the General mortgage, and thereby paid with the exception of a single bond which was lost or destroyed* (pp. 600, 604). The *next day*, to wit, on May 1, 1888, the railway company by its officers filed an answer to said cross-bill, *wrongfully and collusively* admitting all its allegations, and stating that $1,500,000 of the bonds had been exchanged for a like amount of General mortgage bonds, and were held as collateral security only (p. 452).

Farmers' Loan and Trust Company's Cross-Bills.

On the said day, May 1, 1888, and also pursuant to said agreement, the Farmers' Loan and Trust Company filed in Consolidated Cause No. 198 a bill, purporting to be a cross-bill, to foreclose the Main Line and Western division Consolidated mortgage (p. 453), and *on the succeeding day* an answer was filed by the officers of the railway company *wrongfully and collusively* admitting all the allegations of said cross-bill, and stating that $666,000 of its Main Line and Western Division Consolidated mortgage bonds had been exchanged for a like amount of General mortgage bonds, and that the said $666,000 of consolidated bonds were held as security for the exchanged General mortgage bonds (p. 479).

On said May 1st and likewise pursuant to said reorganization agreement, another bill purporting to be a cross-bill was filed by the Farmers' Loan and Trust Company to foreclose the Waco and Northwestern Division consolidated mortgage (p. 469), and *on the succeeding day* an answer was filed by the officers of the railway company, *wrongfully and collusively* admitting all the allegations of said cross-bill, and stating that $483,000 of the Waco and Northwestern consolidated mortgage bonds had been exchanged for a like amount of General mortgage bonds, and that the said $483,000 of consolidated bonds were held as security only for the General mortgage bonds given in exchange (p. 481).

Appellants allege in their bill that the Circuit Court ordering the sale of the railway and its properties had no jurisdiction to make said so-called decree; it had no jurisdiction to order said railway company to pay unmatured debts, nor *about three millions of dollars which it did not owe at all;* it had no power to disregard the law of its procedure and to arbitrarily make said decree *without an ac-*

counting and without a judicial ascertainment of the rights of the parties interested.

The motion to dismiss the appeal is predicated upon two grounds: First, that the Circuit Judge below had no power to allow the appeal; and, Second, that the decree of the Circuit Court of Appeals is final.

I.

The appeal has been regularly taken.

The cause was heard in the Circuit Court of Appeals for the Fifth Circuit in April, 1894, and the decree was entered June 5th, 1894 (p. 919). Appellees state in their brief (p. 28) that this appeal was allowed after the expiration of the November Term of 1893, but the record is silent on this subject. When this cause was heard the court consisted of Circuit Judge McCormick and District Judges Locke and Parlange. *Within eleven months* after the entry of the decree the appeal was taken, and allowed by Judge McCormick.

The appeal may be taken *within a year* after the entry of the order, judgment or decree sought to be reviewed. Counsel's contention would deprive a party of the right of review if the Circuit Court of Appeals filed its decree at or near the end of the term—too late to prepare an application for the allowance of an appeal before it expired.

Counsel state (Appellees' Brief, p. 36) that they understand that the Clerks of the Circuit Courts of Appeals have been instructed by the Clerk of this Court, with the approval or sanction of the Court, that *writs of error* to review judgments of the Circuit Courts of Appeals cannot be issued from the office of the Clerks of those Courts, but must issue from the Clerk's Office of the Supreme Court.

However this may be, as to writs of error, we are dealing in this case with *an appeal*. It is therefore not necessary to discuss a proposition not pending before the Court. *An appeal from a decree* of the lower Court is granted by a Judge of that Court, who approves the bond and signs the citation. *We are informed that in*

every appeal taken to this Court from decrees of the Circuit Courts of Appeals the appeal has been allowed by one of the Judges of the lower Court, who also approved the bonds and signed the citations where a citation was necessary.

Under Section 6 of the Act of 1891, an appeal is a matter of right if taken *within one year* after the entry of the order, judgment or decree sought to be reviewed, and Section 11 declares that: "All provisions of law "now in force regulating the methods and system of review "through appeals or writs of error, shall regulate the methods and "system of appeals and writs of error provided for in this act in re-"spect of the Circuit Courts of Appeals, including all provisions for "bonds or other securities to be required and taken on such appeals "and writs of error, and any Judge of the Circuit Courts of Ap-"peals, in respect of cases *brought or to be brought* to that Court, "shall have the same powers and duties as to the allowance of ap-"peals or writs of error, and the conditions of such allowance, as "now by law belong to the justices or judges in respect of the ex-"isting courts of the United States respectively" *(italics ours).*

As we understand the argument of counsel for appellees, they construe Section 11 as applying to appeals taken from the Circuit and District Courts to the Circuit Court of Appeals, and that there is no provision in the Act covering the allowance of appeals from the Court of Appeals to this Court. This is an erroneous construction of Section 11 and fails to give effect to the word "brought" in the Act. The word "brought" must be construed "in," as contra-distinguished from the words "to be brought," meaning not "*in*," but which may come up to the Circuit Court of Appeals. So read, the Section must refer not only to appeals and writs of error to the Circuit Court of Appeals but also from that Court to the Supreme Court. After an appeal has been properly taken to the Circuit Court of Appeals, it is a case *brought* to that Court, and in respect to said cases Section 11 vests the power in the Judges of that Court to allow an appeal to this Court. Any other construction would not only convict Congress of carelessly omitting to provide for the allowance of appeals from the Circuit Court of Appeals, but would in effect eliminate the word "brought" from the act. As provision is made for cases to be brought as well as for cases *brought*, its meaning must be to vest in any Judge of the Circuit Court of Appeals the right to allow an appeal to this Court in a case properly brought to and in the Circuit Court of Appeals.

There is nothing in the Act changing the well-established and uniform rule of procedure, under which an appeal in a suit in equity may be allowed by a Judge of the Court below; nor anything indicating an intention to throw upon this Court or the Justices thereof the burden of examining the record in every suit in equity, for the purpose of determining whether an appeal, should be allowed, or to deprive the Circuit Judges of that power. The Act, recognizing the existing power of the Justices and Judges of the United States Courts in respect of appeals and writs of error, continues the same in force and extends it to "any Judge of the Circuit Courts of Appeals." A new court was created by the Act, and its Judges were vested with the powers then existing in the Justices or Judges of the United States Courts in respect of appeals and writs of error.

Rule 36 of this Court also recognizes the right of "any Justice of this Court or *any Circuit Judge* within his circuit or any District Judge within his district" to allow an appeal directly to this Court. The Act permits a Circuit Judge to allow an appeal directly to this Court, and there is nothing found therein prohibiting the exercise of the power when the appeal is taken from the Circuit Court of Appeals.

II.

The appeal in this case was allowed on a petition filed in the Circuit Court of Appeals, and signed by Judge McCormick, the Presiding Judge of that Court.

The law creating the Circuit Courts of Appeals clearly and distinctly grants the right of appeal to this Court. It is a violation of the spirit and terms of that act to hold that the manner of procuring the appeal is to be dignified above the right of appeal itself, and that the title which the Judge having power to act in that Court gives himself may frustrate the appeal in other respects legal.

Judge McCormick, the Presiding Judge of the Court of Appeals in this case, and familiar with the facts, granted the appeal herein, and signed the order allowing the appeal, with his own name, affixing no title to his signature, or description of the capacity in which

he acted in granting the appeal. The order granting the appeal was entitled in the Circuit Court of Appeals for that Circuit (p. 919).

The objection to the manner of appeal is without merit. The appeal was taken in strict conformity with the practice universally followed by the bar of the country, and sanctioned by the practice of this Court. The theory of the Appellees seems to be—if intelligible—that the labor of granting an appeal from the Circuit Courts of Appeal devolves on the Justices of this Court, and that no Judge of the Courts of Appeal, of the Circuit Court, nor the Court of Appeals itself, have any power to grant an appeal to this Court. The power to grant an appeal from the Court of Appeals to this Court is not distinctly and in terms conferred upon a Justice of this Court by the Act. There is no more explicit authority given to the Justices of this Court to grant an appeal than is given to the Judges of the Court of Appeals. Indeed, the interpretation given by the Appellees would operate to deny the right of appeal altogether, and would amount to a nullification of the statute.

Appeals, when allowed by law, are favored, and obstructions to the enjoyment of the right should not be built up by construction.

III.

The jurisdiction of the Circuit Court in the present suit did not depend entirely or at all upon the fact that the opposite parties were citizens of different States.

The Court below assumed jurisdiction of this suit because the bill sought to set aside a decree of that Court, and the *res* was in its possession rightfully or wrongfully. The citizenship of the parties nad no part in the Court's assumption of jurisdiction. Appellees contend that this Court should look beyond the bill in this suit and reach back to the old Consolidated Cause No. 198, and the other previous suits involved in this attack, to ascertain the grounds on which jurisdiction was originally obtained. This suit is now before this Court on identically the same record as was before it in Carey vs. The Houston and Texas Central Railway Company, 150 U. S., page 170, when it was held

that the suit "was a distinct proceeding in which the moving "parties were shifted, and the fact that it put in issue the juris- "diction in the proceedings it assailed would not change the appeal "from this into an appeal from the prior decree."

By Section 5 of the Act of 1891, an appeal lies direct to this Court in any case "in which the jurisdiction of the Court is in issue." On the previous appeal taken directly from the Circuit Court to this Court, it was held that the words "in which the jurisdiction of the Court were in issue" meant jurisdiction to entertain the *complainant's bill*—not the jurisdiction over the suit in which the attacked decree was rendered. The same construction must be applied to Section 6 of the Act making judgments or decrees of the Circuit Courts of Appeal final in all cases in which the jurisdiction is dependent *entirely* upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States. So construed it means that the judgment of the Circuit Court of Appeals in this suit is final only if its jurisdiction was dependent *entirely* upon the opposite parties being citizens of different States, without any regard to its jurisdiction over the previous suits.

On the motion to dismiss said first appeal, in 150 U. S., the learned *counsel for the appellees convincingly argued* as follows:

> "The act contains no warrant for a direct appeal in *one* "suit upon a question involving the jurisdiction of the Circuit "Court over *another* suit in the same Court, although such "jurisdictional question may have been involved in the issues "between the parties to the suit in which the appeal is taken" * * * (p. 18 Brief and Argument of Appellees on motion in former appeal).
>
> "The suit to foreclose the mortgages on the railroad "property in which the decree of May 4th, 1888, was ren- "dered, was *one case* in the Court below, and the suit of the "appellants in that court to impeach that decree for pre- "tended fraud and to prevent the consummation of the al- "leged plan of reorganization *was another and distinct case* "*between wholly different parties* relating to some matters "*quite extrinsic and collateral to the issues in the foreclosure* "*suit*, as will be perceived upon a mere glance at the bill" "(pp. 18 and 19 of said brief). * * * "The only existing "statutory authority for a direct appeal to this Court from the

"final decree of the Circuit Court in the case in which the "present appeal is taken upon a question of jurisdiction is "contained in the fifth section of the Act of 1891, which, of "course, negatives the idea that such an appeal lies upon a "question involving the jurisdiction of the Circuit Court over "*another and different case long since disposed of by that* "*Court*" (p. 19 of said brief). * * * "But it is very "clear upon the face of the bill that the technical gravamen "of the case made by this allegation was the pretended collu- "sion and fraud charged in the procurement of the decree in "the railway company and in the other transactions in respect "to which relief was sought against the defendants, and that "the bill was an *original bill for relief* in respect to the "matters alleged in it (Foster vs. Mansfield Railroad Co., "146 U. S., 88; p. 22 of said brief *(italics ours)*.

This Court, in dismissing said former appeal (150 U. S., 170), said:

"Appellants, by filing their bill, invoked the jurisdiction "of the Court below over the entire case; the defendants did "not contest that jurisdiction, and the Court adjudged ac- "cordingly. This is conceded, but it is contended that the "question of jurisdiction was in issue because the bill attacked "the jurisdiction of the Circuit Court over the foreclosure "suit, or its jurisdiction to make the decree of foreclosure "and sale of May 4, 1888, passed in that suit. But the fifth "section of the Act of March 3, 1891, does not authorize a "direct appeal to this Court in a suit upon a question involv- "ing the jurisdiction of the Circuit *over another suit pre-* "*viously determined in the same Court.* It is the jurisdiction "of the Court below over the particular case in which the "appeal from the decree therein is prosecuted, that, being in "issue and decided against the party raising it, and duly cer- "tified, justifies such appeal directly to this Court. This suit "to impeach the decree of May 4, 1888, and to prevent the "consummation of the alleged plan of reorganization, *was a* "*separate and distinct case*, so far as this inquiry is concerned, "from the suit to foreclose the mortgages on the railroad "property; and no question of jurisdiction over the fore- "closure suit or the rendition of the decree passed therein

"can be availed of to sustain the present appeal from the "decree in this proceeding. * * *

"But whether the bill be treated as a bill of review, an "original bill of the same nature, or an original bill on the "ground of fraud, it was a distinct proceeding in which the "moving parties were shifted, and the fact that it put in issue "the jurisdiction in the proceedings it assailed would not "change the appeal from this into an appeal from the prior "decree" *(italics ours).*

The doctrine declared in the former appeal just quoted confines the motion to dismiss the appeal herein to the four corners of the bill. Appellees, stepping outside of said four corners, struggle to show a want of appellate jurisdiction in this Court by reference to the bills in other, prior and independent suits.

If the jurisdictional questions involved in those other cases could not be considered to give jurisdiction to this Court on the former direct appeal, neither can they be considered now to take away jurisdiction. This Court held that the nature of the other suits attacked was not a part of the suit in which the direct appeal was taken. If so, the grounds of jurisdiction of said other suits cannot be considered to frustrate this appeal.

If the case, which was brought to this Court by direct appeal, as stated above, on precisely the bill now pending before this Court, was then and there a separate and distinct suit from the proceedings which it attacked, it is still a separate suit, having undergone no change, and the appeal herein must be determined upon the matters embraced within the bill.

Rouse vs. Letcher, 156 U. S., 47, has no bearing upon the question under discussion, for the reason that it was an intervention proceeding filed in a suit to foreclose a mortgage, and the intervening party had the same rights as were possessed by the other parties to the litigation. By intervening he *became a party to the suit* and he could not prosecute an appeal if the other parties to the same litigation could not.

IV.

If it be necessary or proper to go back to the suits in which the decree that is attacked by this suit was rendered, it will be found that the Court's jurisdiction over said suits did not depend entirely or at all upon the diversity of citizenship of the parties thereto.

Appellees' counsel are not accurate in their statement of the citizenship of the parties in Consolidated Cause No. 198. In Causes No. 198 and No. 199 Easton and Rintoul, *citizens of New York*, were complainants, and the Houston and Texas Central Railway Company, a citizen of Texas, and the *Farmers' Loan and Trust Company, a citizen of New York*, were defendants, and the latter filed answers in said causes (pp. 354 and 366), which raised a controversy *between citizens of the same State.* The existence of said answers is ignored by appellees' counsel in their statement of the case (Appellees' Brief, p. 14).

The said answers formed part of the record in Consolidated Cause No. 198, upon which the foreclosure decree was based. In the cross-bill filed by Shepherd, trustee, a citizen of Texas, the Houston and Texas Central Railway Company, *also a citizen of Texas*, is made a defendant (p. 443).

It will thus be seen that, in the various suits that made up Consolidated Cause No. 198, citizens of New York were arrayed on both sides of the controversy, as were citizens of Texas.

The contention that the Court's jurisdiction to entertain the foreclosure bills rested solely upon the diverse citizenship of the parties necessarily involves a finding that the Court had no jurisdiction whatever, as no such diversity existed.

That was the view of Judge PARDEE, for in his opinion on the final hearing in this suit, referring to the jurisdiction of the Court in which the decree of foreclosure and sale was rendered, he says, after setting forth the purport of Cause 185 (p. 842):

> "To this bill the Houston and Texas Central Railway
> "Company appeared and filed an answer, and thereafter
> "upon notice to defendant the Court took full jurisdiction
> "of the case, appointing Receivers for all the property, real
> "and personal, of the Houston and Texas Central Railway
> "Company, and fully taking the same into the possession of

" the Court." * * * " In no one of the cases mentioned (refer-
" ring to Causes 183, 184, 185 and 188) can there be any ques-
" tion as to the jurisdiction of the Court as far as the citizen
" ship of the parties is concerned. Under these suits the
" Court was in full complete possession through its Receivers
" of all the property of the railway company. In this state
" of the case Rintoul and Easton, trustees under the two
" several deeds of trust upon which suits Nos. 183 and 184
" were based, then came into Court January 21st, 1886, and
" filed two other bills of complaint for the foreclosure and
" sale of all the railroad property covered by said deeds
" of trust. To the bills for the foreclosure of the mortgage
" on the main line, complainants made the Houston and
" Texas Central Railway Company and one Benjamin A.
" Shepherd, a resident of Texas, defendants, and they
" alleged, as to the Farmers' Loan and Trust Company *and*
" *as facts upon which the jurisdiction of the Court was*
" *invoked*, as follows *(italics ours)* :

" ' And your orators further allege that the Farmers' Loan
" ' and Trust Company, as trustees under the said agreement
" ' or deeds of trust hereinbefore described, will, as your
" ' orators believe, be benefited by, and it is their advantage
" ' that the judgment and relief hereinafter prayed for, or
" ' some part thereof, should be granted to your orators.
" ' That said property, covered by the said first mortgage on
" ' said main line, as well as all the other property, assets and
" ' effects of said railway company being now in the hands
" ' of this Court by the receivership existing in respect to the
" ' same, and your orators being required by law to institute
" ' this action in this Court, and to come before this tribunal
" ' in order to reach the property in its possession, and to
" ' obtain its rights concerning the same, and all the parties
" ' interested in the property covered by said mortgage on
" ' the main line, and as well as all the other mortgages and
" ' property of said railway company being now before the
" ' Court in said actions hereinbefore described as Nos. 183,
" ' 184, 185 and 188, and on the equity docket of this Court,
" ' the said Farmers' Loan and Trust Company may and
" ' should be a party defendant in this cause, irrespective of
" ' its citizenship, and said corporation should be brought
" ' in as a defendant herein by the order and direction of this

" ' Court, and should be bound by the judgment and proceed-
" ' ings herein.'

" In the bill for the foreclosure of the mortgage covering
" the eastern division they made the same parties defendant,
" and the like averment as to the Farmers' Loan and Trust
" Company as to the jurisdiction of the Court. The facts
" alleged being true and of record the jurisdiction of the
" Court to enter a decree of foreclosure and sale of the prop-
" erty covered by the mortgages described seems complete "
(p. 844). Then, quoting from The Morgan's Company vs. The Texas Central Railway, 137 U. S., 171, he says:

" ' The jurisdiction of the Circuit Court did not depend
" ' upon the citizenship of the parties, but on the subject
" ' matter of the litigation. The property was in the posses-
" ' sion of that Court, and this drew to it the right to decide
" ' upon the conflicting claims of this ultimate possession of
" ' control.' "

This opinion, upon which appellees rely, distinctly declares that the foreclosure proceedings did not depend upon the citizenship of the parties, but on the subject matter of the litigation.

Appellees are estopped of record in this case from contending, as they do in their brief, that jurisdiction in the foreclosure suits did depend upon the citizenship of the parties thereto. They procured in this case an adjudication that the jurisdiction of the Circuit Court in the foreclosure proceedings in controversy did not depend on diverse citizenship. They will not be permitted to blow hot and cold.

The Circuit Court of Appeals concurred in the views of the learned trial Judge, saying: "Being satisfied of the jurisdiction of the " Court in the suit in which the decree of foreclosure and sale was " rendered *as the property was in the actual possession of the Court*" (p. 912) *(italics ours)*.

In no aspect of this case then can it be said that the Court either in the case at bar or in the foreclosure suits assumed jurisdiction entirely or at all on the ground of diverse citizenship of the parties, and appellees will not now be permitted to contend against the terms of both decisions below in their favor.

V.

Consolidated Cause No. 198 was in no sense ancillary to or a continuation of Southern Development Case No. 185, which was dismissed on demurrer.

No jurisdiction was claimed or assumed by the Court in the Consolidated Cause by reason of the diversity of citizenship which existed in the Southern Development Cause No. 185. It was claimed solely because the *res* was in possession of the Court. Neither Consolidated Cause No. 198 nor any of the suits which made up said cause was in any way a part of, or supplemental to the Southern Development suit, which was practically an action at law to recover for money loaned and advanced, whilst the subsequent, separate and distinct suits were in equity to foreclose mortgages. It was never asserted either by counsel or the Court, that jurisdiction attached in Consolidated Cause because it was ancillary to, connected with or part of the Southern Development suit. The sole claim made and sustained in the Court below was that jurisdiction in said Consolidated Cause vested upon the theory that the Southern Development suit brought the *res* under the jurisdiction of the Federal tribunal.

At the instance of complainants in the Consolidated Cause, it was adjudicated that the Southern Development suit was itself insufficient to vest jurisdiction in the Court over the property, and said suit was dismissed for want of equity. The appellees cannot claim a contrary conclusion to the one reached by the Court on the demurrers to the Southern Development bill.

In the previous appeal (150 U. S., *supra*) appelles' counsel urged with great earnestness that this suit was distinct and separate from the proceedings it attacked, and the Court so held, and on that ground alone the direct appeal was dismissed. Now the same counsel with equal zeal argue on the same record that this is an ancillary cause, and that the present appeal should be dismissed for that reason. In the Court below they contended that said Court assumed jurisdiction in Consolidated Cause No. 198 because it had possession of the *res* by its receivers appointed in the Southern Development action (No. 185). Now they argue that jurisdiction was assumed

in the said Consolidated Cause by reason of the diversity of citizenship of the parties therein.

VI.

This Court will not entertain a motion to dismiss if it imposes the duty to make an investigation of the entire record, for it will not look into said record to determine what its final decree should be.

The question as to the jurisdiction of the Circuit Court below in the foreclosure proceedings attacked by the present suit involves the merits of the controversy and will not be considered by this Court on appellees' motion to dismiss.

Appellees have printed some 922 pages, including the records in twelve suits (Causes 183, 184, 185, 188, 198, 199, 201; Consolidated Cause 198; suit brought by Shepherd's cross-bill, two suits brought by Farmer's Loan and Trust Company's cross-bills and the suit at bar) and demand that this Court on a motion to dismiss undertake the task of examining said records in order to determine whether it has jurisdiction in this separate case to entertain the present appeal.

> In Semple vs. Hagar, 4 Wall., 431, the Court say: "In "many cases the question of jurisdiction is so involved with "the other questions decided in the case that this Court "cannot eliminate it without the examination of a voluminous "record and hearing upon the whole merits of the case. In "such instances the Court will reserve the question of juris- "diction until the case is heard on the final argument on the "merits."
>
> See, also,
>
> Day vs. Washburn, 23 How., 309.
> Bohanan vs. Nebraska, 118 U. S., 231.
> Hill vs. Chicago, etc., R. R. Co., 129 U. S., 170.

The questions of jurisdiction raised by appellees' motion are brought before this Court on "extracts from the record," which comprise *over nine hundred pages*. In the determination of these

questions, the merits of the litigation are involved and an examination of the entire record will become necessary. This appeal involves interests amounting to many million dollars, and it is respectfully urged that, if there be any doubt, these questions should not be disposed of adversely to the appellants in anticipation of, and without a full hearing on, the merits.

It is respectfully submitted that the motion should be denied.

JEFFERSON CHANDLER,
A. J. DITTENHOEFER,
GEORGE CLARK,
RUSSELL H. LANDALE,
Of Counsel.

Office Supreme Court U. S.
FILED.
DEC 23 1895
KENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 642.

STEPHEN W. CAREY AND OTHERS,
APPELLANTS,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY AND OTHERS.

Memorandum for The Houston and Texas Central Railway Company, and others, relative to the Brief of Appellants in Opposition to the Motion to Dismiss the Appeal.

The Brief for the appellants in opposition to the motion to dismiss the appeal, seems to call for no reply, as the questions involved are discussed very fully in the Brief in support of the motion, and we do not perceive that the argument presented therein has been met in the Brief for the appellants.

As the Brief for the appellants, on page 2, refers to the Reorganization Agreement, and states that it is not included in the extracts from the record printed for the present motion, we have had the Reorganization Agreement printed from the record, and copies of the same will be handed to the Court on the submission of the motion.

J. HUBLEY ASHTON,
E. B. KRUTTSCHNITT,
ADRIAN H. JOLINE,
Of Counsel for Appellees.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

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STEPHEN W. CAREY ET AL.

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY ET AL.

Appellants now give the Court to know that they have learned and the fact is that since filing their brief in opposition to the motion to dismiss herein appellees have filed in this Court additional extracts from the record in the above-entitled cause; that no service of said additional extracts from the record was made upon any of the counsel of record representing appellants in this Court.

Appellants contend that under the rules of this Court they are entitled to be served with the full extracts from the record relied upon by appellees to support their motion to dismiss three weeks prior to filing their brief in opposition to said motion; that said added extracts are material; otherwise they would not have been filed.

Appellants ask that the motion to dismiss be denied for

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JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

STEPHEN W. CAREY and others,
Appellants,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and others,
Appellees.

No. 642.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To J. HUBLEY ASHTON, ESQ., CHARLES H. TWEED, ESQ., and ADRIAN H. JOLINE, ESQ., Counsel of Record for the Appellees in the above-entitled cause:

Please take notice that the appellants in the above-entitled cause will, on Monday, April 27th, 1896, upon the coming in of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court a motion for an order directing the clerk of this Court to omit from the mandate to be issued to the Circuit Court of Appeals for the Fifth Circuit any provision granting costs to appellees on the dismissal of the appeal herein, and that a printed copy of said motion is hereto attached.

New York, April 11th, 1896.

R. H. LANDALE,
Attorney for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

STEPHEN W. CAREY and others, Appellants, vs. THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and others, Appellees.	No. 642.

MOTION FOR AN ORDER AS TO APPELLEES' COSTS.

Now at this time come the appellants herein and respectfully move this Court for an order directing the clerk, in issuing the mandate to the Circuit Court of Appeals for the Fifth Circuit, to omit any provision granting costs to the appellees on their motion to dismiss the appeal herein, for the following reasons, viz.:

FIRST. That, as appellants are informed by the clerk, he intends to insert in the mandate the sum of $1,566.25 costs, incurred by appellees, to be paid by the appellants, of which amount $1,145.75 is for costs of printing certain extracts from the record, prepared and printed by appellees, and used on their motion to dismiss the appeal herein, and $405, being the clerk's fees for "preparing record for printer, etc.," the remaining $15.50 being for entering appearance of counsel and other costs incurred by appellees.

Supreme Court Rule 24, subdivision 1, provides that "in all cases where any suit shall be dismissed in this court except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties."

This appeal was, on motion of appellees, dismissed by the Supreme Court, for want of jurisdiction.

SECOND. That by said Rule 24, subdivision 6, it is provided, "when costs are allowed in this Court it shall be the duty of the clerk to insert the amount thereof in the body of the mandate or other proper process sent to the Court below, and annex to the same the bill of items taxed in detail."

This Court, in dismissing the appeal, did not allow any costs.

THIRD. That the motion to dismiss the appeal was brought on long prior to the time when the cause could be reached for hearing upon the merits in its regular order on the calendar, and appellants had before said motion was made, printed at considerable expense the record consisting of some 1379 pages, which they intended to use when the case came up for argument on the merits.

FOURTH. That upon this appeal, no supersedeas was applied for or granted, and there was therefore no necessity for appellees' motion to dismiss the appeal prior to a hearing upon the complete record printed by the appellants as hereinbefore stated.

FIFTH. That by Rule 24, Subdivision 7, the clerk in a proper case is entitled "for preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library and the parties or their counsel, fifteen cents per folio."

No provision is made allowing fees to the clerk for extracts from the record prepared solely by the moving party, for use upon a motion to dismiss an appeal.

Wherefore, appellants pray that this motion be granted, and that the clerk be directed to omit from the mandate issued to the Circuit Court of Appeals for the Fifth Circuit any provision granting costs to the appellees on their motion to dismiss the appeal herein, and for such other relief as to this Honorable Court may seem proper.

R. H. LANDALE,
Attorney for Appellants.

APR 24 18
JAMES H. McKENNE

Supreme Court of the United States.

OCTOBER TERM, 1895.

STEPHEN W. CAREY ET AL.,
Appellants,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY ET AL.
No. 642.

Memorandum in Support of Motion for an Order as to Appellees' Costs.

It is unnecessary at this time to enter into any explanation as to this suit, as it has now been before this Honorable Court on several occasions, and therefore the Court is thoroughly conversant with its history.

An appeal was taken herein to this Court from a decree of the United States Circuit Court of Appeals for the Fifth Circuit, and was on March 2d, 1896, dismissed for want of jurisdiction.

In the opinion no costs were allowed appellees, and it was merely ordered that the appeal be dismissed.

The clerk has demanded from appellants the sum of $1,566.25, which embraces *all* the costs that could have been taxed against appellants if there had been an affirmance on the merits, and unless said sum be paid he will insert that amount in the mandate to the Court below and execution will issue thereon against appellants.

By Rule 24, subdivision 1, it is provided that, "In all cases where any suit shall be dismissed in this court *except* where the dismissal shall be for *want of jurisdiction*, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties."

Subdivision 5 of said rule defines the duty of the clerk as to the issuance of the mandate and subdivision 6 directs that " *When costs are allowed* in this court it shall be the duty of the clerk to insert the amount thereof in the body of the mandate or other proper process, sent to the court below and annex to the same the bill of items taxed in detail."

In this case the appeal was dismissed for *want of jurisdiction* and clearly, under the rules, no costs could be, nor were any allowed. The clerk can only insert the costs when the same are allowed by the Court.

The clerk refers us to the ruling in Bradstreet Company vs. Higgins, 114 U. S., 262, in which this Honorable Court deemed it proper to amend the judgment and impose upon the plaintiff in error the costs of the motion to dismiss, which, in that case, included the cost of printing the record and the clerk's fees for supervising.

In that case it became necessary for the defendant in error to cause the record to be printed. The motion to dismiss was made upon the whole record, which plaintiff in error had omitted to print, and as he had secured a *supersedeas*, defendant in error was compelled to come into court and move to dismiss in order to get rid of it.

In the case at bar there was no *supersedeas*, nor was the record printed by appellees; but, in support of their motion, they simply compiled and had printed certain papers termed by them " Extracts from the record, on motion of appellees to dismiss the appeal."

There was no delay on the part of appellants in printing the record in this case; the fact being that they had printed, for use on the hearing on the merits, almost the entire record.

Respectfully submitted,

R. H. LANDALE,
Of Counsel for Appellants.

Office Supreme Court
FILED.
APR 27 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895. NO. 642.

STEPHEN W. CAREY *et al.*, APPELLANTS,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*

Memorandum in Opposition to the Motion of Appellants for an Order as to Appellees' Costs.

The counsel of the appellees have been served with notice of a motion to be submitted by the appellants for an order by the Court directing the Clerk to omit from the mandate to be issued in this case any provision granting costs to the appellees on the dismissal of the appeal herein.

The question suggested by this motion is disposed of by the authority of the decision of the learned Court in the case of *Bradstreet Company* v. *Higgins* (114 U. S., 262), in which it was adjudged upon full consideration that a defendant in error, on whose motion a writ of error is dismissed for want of jurisdiction, is entitled to recover any costs in this Court which are incident to his motion to dismiss.

The Court is familiar with that case, and this refer-

ence to it would seem to be a sufficient response to the present motion of the appellants.

It has been decided by the Court that the appeal, in this case, was an unauthorized appeal, wrongfully taken by the appellants, which the appellees had the right at any time to move to dismiss, and under the principles established in *Bradstreet Company* v. *Higgins*, the amount of the cost of printing the portions of the record requisite to be printed for the motion to dismiss, and the Clerk's supervising fee, are properly chargeable to and taxable against the appellants, as part of the costs of the motion of the appellees to dismiss the unauthorized appeal.

It is immaterial whether or not there was a *supersedeas* upon that appeal, which itself necessarily clouded the title of the property of the appellees under the decree of foreclosure and sale. The suggestion of the appellants that the appellees should have allowed the title to their property to remain so clouded for two or three years, by refraining to move to dismiss the appeal until the case was reached for hearing upon the merits in its regular order on the calendar, seems to call for no comment.

It is stated by counsel of the appellants, that the appellants had printed the record consisting of 1379 pages, which they intended to use when the case came up for argument on the merits, but it is not stated, nor is it the fact, that copies of the record thus printed were filed by the appellants, or could be used by the appellees at the time the record was wanted by them on their motion to dismiss.

In connection with this statement on the part of the appellants, it is proper to mention that on July 12, 1895, Mr. Joline advised Mr. Landale, in a letter of that date, that the appellees would move to dismiss the appeal, and stated that if Mr. Landale would file the requisite number of his printed copies of the record, it would obviate the necessity of the appellees printing for their proposed motion the whole record or extracts therefrom.

The counsel of the appellees, however, were unable to make any arrangement with the counsel of the appellants for filing his printed copies of the record for use on the motion.

The appellees were obliged, therefore, to print, as they did, those portions of the record which it was necessary to lay before the Court in support of their motion to dismiss the appeal.

A copy of Mr. Joline's letter to Mr. Landale, under date of July 12, 1895, here referred to, is annexed to this memorandum.

The appellants were thus advised, in due time, that these costs would accrue, unless they filed their printed copies of the record, as suggested and desired by the appellees.

It is respectfully submitted that the motion should be denied.

J. HUBLEY ASHTON,
ADRIAN H. JOLINE,
Of Counsel for Appellees.

(Copy.)

NEW YORK, *July 12, 1895.*

Carey *v.* H. & T. C.

R. H. LANDALE, Esq., N. Y. City.

DEAR MR. LANDALE: As you doubtless anticipate, we expect to make a motion in due time to dismiss the appeal in this case to the Supreme Court of the United States. Of course, if the appeal should be dismissed, your parties would have to pay for the printing of such extracts from the record as we should print upon our motion. Understanding that you have a sufficient amount of printed copies of the record to provide for the amount required to be filed under the rules of court, and not desiring to impose any unnecessary costs upon you in case we should be successful on our motion, it seems to me that if you would file the requisite number of printed copies of the record, that would, as I understand it, obviate the necessity of our reprinting for the motion the whole record or extracts therefrom. Do you not think that this would be the best way to arrange the matter, and are you willing to so file your printed copies?

I am going out of town for some days, and if you should write to the office you might address Mr. Calhoun.

Very truly yours,

ADRIAN H. JOLINE.